The D.C. Superior Court, however, is considered a state court for removal purposes, rather than a court of the "United States." 28 U.S.C. § 1451(1); *see Palmore v. United States*, 411 U.S. 389, 408–09 (1973) (describing the District of Columbia court system as similar "to those of the local courts found in the 50 States of the Union"). Because the D.C. Superior Court is not a court of the "United States," the federal government's sovereign immunity applies in Title VII actions heard there, stripping the D.C. Superior Court of subject-matter jurisdiction. Under the derivate jurisdiction doctrine, the District Court is barred from hearing the same claims upon removal. *See Merkulov*, 75 F. Supp. 3d at 129. For this reason, the Court should dismiss Plaintiff's Title VII claim under Rule 12(b)(1).

3. Is Plaintiff entitled to a *Bivens* cause of action?

Short answer: Plaintiff is not entitled to a *Bivens* cause of action because Congress has already provided a comprehensive scheme for federal employment discrimination remedies.

Unlike Plaintiff's other claims, because the D.C. Superior Court had subject-matter jurisdiction over her *Bivens* claim, so does this Court upon removal. *Tafflin v. Levitt*, 493 U.S. 455, 458–60 (1990). A *Bivens* claim is an implied cause of action for damages arising from constitutional violations by federal government officials. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 395–97 (1971); *X.P. Vehicles, Inc. v. Dep't of Energy*, 118 F. Supp. 3d 38, 68 (D.D.C. 2015). However, *Bivens* causes of action are not available for "each and every type of constitutional infraction." *X.P. Vehicles, Inc.*, 118 F. Supp. 3d at 68. For example, when Congress has established a comprehensive system to administer public rights, has not inadvertently omitted damages remedies for certain claimants, and has not plainly expressed an intention that the courts preserve *Bivens* remedies, courts must withhold their power to fashion damages remedies. *Spagnola v. Mathis*, 859 F.2d 223, 228 (D.C.

Cir. 1988) (citing *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988) and *Bush v. Lucas*, 462 U.S. 367, 368 (1983)).

Here, Plaintiff asserts an employment discrimination claim due to her alleged termination of federal employment based on her status as a [omitted]. ECF No. 1-1 at 1, 3. However, Title VII is the "*exclusive* judicial remedy for claims of discrimination in federal employment." *Webster v. Spencer*, 318 F. Supp. 3d 313, 320 (D.D.C. 2018) (citing *Brown v. G.S.A.*, 425 U.S. 820, 835 (1976)) (emphasis in original). Because Congress enacted through Title VII a "comprehensive scheme that addresses precisely the wrongdoing alleged" by Plaintiff—federal employment discrimination—her asserted *Bivens* claim must fail. *See id.*; *see also Spagnola*, 859 F.2d at 228. For this reason, the Court should dismiss Plaintiff's *Bivens* cause of action for failure to state a claim upon which relief can be granted. *See* FED. R. CIV. P. 12(b)(6).

IV. Conclusion

Because Plaintiff is not entitled to *Bivens* relief, and jurisdiction is lacking for Plaintiff's Executive Order and Title VII claims, the Court should grant Defendant's Motion to Dismiss.

Applicant Details

First Name	**Caleb**
Last Name	**Hersh**
Citizenship Status	**U. S. Citizen**
Email Address	**ceh8766@nyu.edu**
Address	**Address** Street **495 Saint Johns Place, Apt. 3B** City **Brooklyn** State/Territory **New York** Zip **11238**
Contact Phone Number	**(914) 907-3505**

Applicant Education

BA/BS From	**Brown University**
Date of BA/BS	**May 2017**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 22, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**New York University Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Orison S. Marden Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hershkoff, Helen
Hershkoff@mercury.law.nyu.edu
212-998-6285
Moreau, Sophia
sr.moreau@utoronto.ca
Been, Vicki
vicki.been@nyu.edu
212-998-6223

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Caleb Hersh
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Brooklyn, NY 11238
ceh8766@nyu.edu
(914) 907-3505

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to apply for a clerkship in your chambers for the 2024-25 term. I am a rising third-year student at New York University School of Law. In addition, I am committed to pursuing a legal career in public service.

Enclosed are my resume, transcript, a writing sample, and letters of recommendation. My recommenders are Professors Vicki Been and Sophia Moreau, in whose law classes I was a student, and Professor Helen Hershkoff, for whom I served as a Research Assistant. They may be reached as follows:

Professor Vicki Been
(212) 998-6223
vicki.been@nyu.edu

Professor Sophia Moreau
(416) 946-7830
sm11119@nyu.edu

Professor Helen Hershkoff
(212) 998-6285
helen.hershkoff@nyu.edu

Please do not hesitate to let me know if I can provide you with any additional information. Thank you for your consideration.

Respectfully,

Caleb Hersh

CALEB HERSH

495 Saint Johns Place, Apt. 3B, Brooklyn, NY 11238
(914) 907-3505 | ceh8766@nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Candidate for J.D., May 2024
Unofficial GPA: 3.79
Honors: Florence Allen Scholar (Top 10% of the class after four semesters)
New York University Law Review, Articles Editor & Quantitative Editor
Moelis Urban Law & Public Affairs Fellow—*paid fellowship to conduct housing law research*
Dean's Scholar—*partial tuition scholarship based in part upon academic merit*
Activities: Orison S. Marden Moot Court Competition, Semifinalist (2022–23)
American Constitution Society, Board Member-at-Large (2022–23)
Note: *The NIMBY Filibuster: Zoning Protest Petitions, the Fourteenth Amendment, and Affirmatively Furthering Fair Housing* (in progress)

BROWN UNIVERSITY, Providence, RI
Master of Public Affairs (MPA), Data-Driven Public Policy Track, May 2018
Cumulative GPA: 4.0

BROWN UNIVERSITY, Providence, RI
A.B. in Political Science, May 2017
Cumulative GPA: 3.79
Honors: Departmental Honors in Political Science
Thesis: *Nonpartisan Elections and the North Carolina Supreme Court, 1995–2013*

EXPERIENCE

UCLA VOTING RIGHTS PROJECT, Los Angeles, CA
Legal Fellow, Summer 2023
Participate in all aspects of the Project's current voting rights litigation. Draft and edit court filings, conduct legal and factual research, and organize discovery materials to prepare attorneys for depositions and upcoming trials.

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, New York, NY
Legal Intern, Summer 2022
Drafted model legislation to remedy discrimination in cooperative housing sales. Analyzed agency authority related to proposed fair housing initiatives. Performed legal research regarding state preemption of exclusionary zoning ordinances.

PROFESSOR HELEN HERSHKOFF, NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Research Assistant, Summer 2022
Assisted Professor Hershkoff in the development of a course on impact litigation. Researched the role of impact litigators in the legal profession and the historical development of impact litigation as a distinct branch of legal practice.

WESTCHESTER COUNTY BOARD OF LEGISLATORS, White Plains, NY
Legislative Aide to Legislator Catherine Borgia, September 2018–June 2021
Managed all office operations—assisted constituents with county agency interactions, disseminated information about county government services, planned outreach events, conducted research on potential legislation, coordinated intern hiring and project supervision, cultivated media relations, and drafted statements and letters. Staffed the Board's Voting Reform Working Group, assisting legislators in drafting report on election reform implementation.

ADDITIONAL INFORMATION

Former Trustee of the micro-loan nonprofit Ossining Micro Fund (November 2019–September 2021). Hiked all forty-six Adirondack high peaks. Published sleep research study: Caleb Hersh, Julia Sisti, Vincent Richiutti & Eva Schernhammer, *The Effects of Sleep and Light at Night on Melatonin in Adolescents*, 14 HORMONES 399 (2015).

Name:	**Caleb E Hersh**
Print Date:	**06/07/2023**
Student ID:	**N15338473**
Institution ID:	**002785**
Page:	**1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Ashley Binetti Armstrong			
Torts	LAW-LW 11275	4.0	A
Instructor: Cynthia L Estlund			
Procedure	LAW-LW 11650	5.0	A-
Instructor: Jonah B Gelbach			
Contracts	LAW-LW 11672	4.0	B+
Instructor: Barry E Adler			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Barry E Friedman, Farhang Heydari			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	A-
Instructor: Daryl J Levinson			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Ashley Binetti Armstrong			
Legislation and the Regulatory State	LAW-LW 10925	4.0	A-
Instructor: Roderick M Hills			
Criminal Law	LAW-LW 11147	4.0	B+
Instructor: Sheldon Andrew Evans			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Barry E Friedman, Farhang Heydari			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

The Law of Democracy	LAW-LW 10170	4.0	A
Instructor: Samuel Issacharoff, Richard H Pildes			
Quantitative Methods Seminar	LAW-LW 10794	2.0	A
Instructor: Daniel L Rubinfeld, Katherine B Forrest			
Orison S. Marden Moot Court Competition	LAW-LW 11554	1.0	CR
Evidence	LAW-LW 11607	4.0	A-
Instructor: Daniel J Capra			
Research Assistant	LAW-LW 12589	1.0	CR
Summer 2022 Research Assistant			
Instructor: Helen Hershkoff			
Theories of Discrimination Law Seminar	LAW-LW 12699	2.0	A
Instructor: Sophia Moreau			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	44.0	44.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Complex Litigation	LAW-LW 10058	4.0	A
Instructor: Samuel Issacharoff, Arthur R Miller			
Colloquium on Law, Economics and Politics of Urban Affairs	LAW-LW 10634	2.0	A
Instructor: Vicki L Been			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	A+
Instructor: Joseph E Neuhaus			
Orison S. Marden Moot Court Competition	LAW-LW 11554	1.0	CR
Property	LAW-LW 11783	4.0	A
Instructor: Katrina M Wyman			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	57.0	57.0

Allen Scholar-top 10% of students in the class after four semesters
Staff Editor - Law Review 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

New York University
A private university in the public service

School of Law
40 Washington Square South, Room 308C
New York, NY 10012-1099

Helen Hershkoff
Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties
Co-Director, The Arthur Garfield Hays Civil Liberties Program

Telephone: (212) 998-6285
Fax: (212) 995-4760
Email: helen.hershkoff@nyu.edu

June 5, 2023

Dear Judge:

I am happy to recommend Caleb Hersh for a judicial clerkship with you following his graduation from New York University School of Law in May 2024. Caleb is an editor of the NYU Law Review and also an active participant in the Marden Competition. He enjoys learning about the law and worked as a county legislative aide before coming to Law School. His intelligence, reliability, and writing skills would in my view make him an excellent judicial clerk.

I met Caleb via Zoom during his first year at NYU when he applied to be a Research Assistant. He made a very positive impression—articulate, enthusiastic, engaged—and I had no reservations in offering him a position. Caleb's assignment related to a project on litigation strategy, specifically, when public interest organizations seeking to challenge laws, regulations, or practices should opt for single-client, single-claim litigation rather than class actions or other aggregative suits. Caleb focused on a professional dimension of the project, namely, why lawyers of all ideological stripes tend to disparage single-case litigation as intellectually less interesting than suits in which multiple parties are joined. I asked him to review the literature, if any, on why law reform work (and specifically impact litigation) is perceived in the legal world as relatively more prestigious—at least within the umbrella of "public interest law"—than strictly individual-focused representation. I also asked Caleb to review the literature on advocacy work that variously is described as "political lawyering" and "impact work" to get a sense of how commentators describe the strategic choices and tradeoffs made by lawyers who aim to achieve law reform through their legal work (and whether there even *is* a specific set of tools of the trade for this line of work). And finally, I asked him to survey the literature on procedural neutrality and how it affects the characterization of advocacy choices regarding single-case or aggregated lawsuits. As these broad descriptors suggest, the research required Caleb to exercise judgment, to be intellectually nimble, and to avoid getting lost in rabbit holes. Caleb proved himself to be highly adept and produced a well written and useful literature review providing exceptionally helpful background for the project.

Caleb's experiences before coming to NYU reflect his intellectual versatility and range of skills. While working as a county legislative aide, he also served as a board member for the Ossining Micro Fund, a nonprofit organization that delivers no-interest loans to community members with low incomes who are facing difficult-to-afford one-off expenses (such as a car

repair or rental security deposit). In this capacity, Caleb interacted with applicants who faced difficult situations, came from marginalized communities, and often had to hurdle complex and even discriminatory bureaucratic barriers. It was important to communicate in simple but not simplistic ways, to be empathetic, and to remain calm—all skills that I think would contribute to his work in chambers.

Caleb's intelligence, excellent research and writing skills, and reliability are all qualities of an excellent judicial clerk and I recommend him with warm enthusiasm.

Thank you for your consideration.

Sincerely,

Helen Hershkoff

UNIVERSITY OF TORONTO
FACULTY OF LAW

June 3, 2023

RE: Caleb Hersh, NYU Law '24

Your Honor:

I am writing to give my strongest recommendation of Mr. Caleb Hersh, a student at NYU School of Law who is applying for a clerkship with you. I am Professor of Law and Philosophy at the University of Toronto Faculty of Law, and I am myself a former law clerk, having clerked for Chief Justice Beverley McLachlin of the Supreme Court of Canada in 2002-03. I came to know Caleb extremely well this past fall because he was one of the two top students in my 2L and 3L seminar on "Theories of Discrimination Law" at NYU School of Law. Given my past experience clerking and twenty years of teaching the top law students in Canada, many of whom have also gone on to clerk at our Supreme Court, I can confidently say that Caleb ranks among the best students whom I have taught and whom I have recommended for clerkships. He has all of the attributes that make for a first rate law clerk: very high intelligence and superb analytic skills, along with an ability to cut right to the heart of a legal issue; excellent research and writing skills; and something that I consider to be of great importance, which is a deep maturity in his understanding of the social effects of different laws, the real impact they have on various groups of citizens. Some law students come across as young and less than worldly. Caleb has all the energy and optimism of the young, combined with a real-world awareness of politics and society that makes his analyses of legal problems much richer than the analyses provided by his peers. (I think this is reflected in his recent stellar grades this past term, as he has moved into more specialized courses that require the kind of deep thinking and broad perspective that he is so talented at bringing to his legal analyses).

Let me tell you in more detail about Caleb's work for my class. The class was a seminar in the field of discrimination theory, which combined studies in comparative anti-discrimination law (looking at the US, Canada, the EU and the UK) with philosophical work on what makes discrimination wrongful. The texts we read were quite challenging, ranging from legal judgments to academic commentaries on cases to difficult philosophical articles. Caleb rose to every challenge, contributing to every discussion thoughtfully and helpfully, both in class and on our weekly online discussions that we would have before each class. He was always engaged with his peers in addition to being engaged with the material, responding with deep respect for the other students but never afraid to disagree and lay out his own different ideas. Caleb also came several times to my office hours (very few students did) to pursue lines of argument in greater detail and to ask for recommendations for further reading. He has terrific initiative, and yet never comes across as pushy or as trying to please: he is just genuinely excited by legal questions and has a

deep commitment to trying to resolve legal problems in a way that is attentive to the impact of laws on many social groups.

Caleb's written work for my class was superb. Students in this seminar were given the opportunity to choose their own essay topics if they wished, and he chose to write his first essay on "Race-norming: An Anti-subordination Account of *G.M.M. Ex Rel. Hernandez-Adams v. Kimpson*. Caleb provided a very sophisticated analysis of race-norming and a fascinating and plausible explanation of its wrongness by appealing to Professor Cass Sunstein's anti-caste principle and offering a detailed discussion of the dynamics of subordination. His second paper, which I believe he is submitting as a writing sample along with his clerkship application, considered some of the difficulties that might be faced by plaintiffs if, as certain Canadian legal scholars have recommended, legislatures or courts were to recognize a new tort of "negligent discrimination." In this paper, Caleb focussed specifically on the context of medical malpractice and considered the problems that plaintiffs might face when trying to bring claims of negligent discrimination in this context, given the deference that courts normally pay to professional custom when they assess the standard of care. His paper, as you will see, is nuanced without ever getting lost in the details; is well researched; puts together ideas from different areas of law and theory in novel and very fruitful ways; and is sensitive to the needs of marginalized social groups and to political and legal realities.

I am sure that Caleb will go on to make a significant contribution to the legal profession. For selfish reasons, I hope he will one day consider moving into academia, since he is just so full of creative ideas and fascinating suggestions! But I gather he has in mind a career in impact litigation within the voting rights or fair housing fields –which would be a wonderful use of his talents and his commitments. I am sure that the skills he would gain from a clerkship would serve him very well in such work.

I have not mentioned Caleb's many accomplishments and activities in law school, only because I am assuming you will read these for yourself and can form your own judgments about them. But before I close, I should just highlight his involvement in the NYU Law Review, his internship last summer at the NYC Department of Housing Preservation and Development, and his upcoming summer as a Legal Fellow with the UCLA Voting Rights Project. All of these are both achievements in themselves and sources of excellent background experience for a prospective law clerk.

For all the reasons I have indicated, I give Caleb my highest recommendation for a clerkship with you. I would be happy to speak to you further about Caleb and his work over the phone: please feel free to contact me at 1-416-846-2817.

Sincerely,

Professor Sophia Moreau
HLA Hart Visiting Fellow, Oxford (2023)
Visiting Professor of Law, NYU (Fall 2022)
Professor of Law and Philosophy, University of Toronto

New York University
A private university in the public service

School of Law

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Vicki L. Been
Judge Edward Weinfeld Professor of Law
Faculty Director, Furman Center for Real Estate and Urban Policy
Associated Professor of Public Policy at NYU's Robert F. Wagner Graduate School of Public Service

June 12, 2023

RE: Caleb Hersh, NYU Law '24

Your Honor:

Caleb Hersh has asked me to write to you about his qualifications to serve as your law clerk for the term beginning in the fall of 2024. I am delighted to do so, because Caleb has been a special treat to work with, and I am confident that he will make a terrific clerk. He is exceptionally bright, personable, hard-working and conscientious, and writes well and easily.

I first met Caleb through the Moelis Urban Law and Public Affairs Fellows program, a scholarship one of the nation's leading affordable housing developers established to support promising law students who have shown a passion for housing, land use, and urban policy issues. Fellows participate in a series of events that expose them to cutting edge work on those issues, and are required to spend at least one summer and one semester working for non-profit organizations, developers, government agencies, or research centers devoted to urban policy. I am a faculty advisor for the Moelis program, and get to know the fellows in that capacity. From the moment I met Caleb at one of the program's first events for his class, I was impressed by his incredible love of learning, sustained commitment to issues of public policy, and unassuming charm.

Caleb enrolled in a Colloquium I taught this spring that surveyed the ways in which local, state, and federal governments are requiring a variety of different types of impact analyses to predict or review the ways in which policies and decisions in environmental, land use and housing are hindering or advancing racial equity. Those tools pose a myriad of legal and policy issues, especially given the Supreme Court's pending decision about the use of race in the admissions decisions of colleges and universities.

The colloquium featured guest lectures from a number of experts who had either designed or critiqued such impact assessment tools, and I required students to submit questions for those experts in advance of their visits to the class. Caleb consistently asked the guests questions that were probing, perceptive, and generative. In our discussions with guests and in background sessions, Caleb's comments and questions added significant depth to the discussion. He often made connections or saw angles to an argument that his peers missed. While unfailingly polite and generous, he followed up when arguments weren't persuasive, and suggested ways of thinking about the problems that showed the value of both his graduate work in public policy and the strength of his legal acumen. Caleb objectively sees

the weaknesses of arguments on both sides of a debate, and is tenacious in working through difficult problems.

The colloquium also required students to submit two critiques of tools they had discovered in use around the world. Caleb's first paper drew on what he was learning in a seminar on theories of discrimination to explore whether programs local governments are adopting to provide reparations for past racial discrimination will survive legal challenge. He argued that the Supreme Court increasingly is importing tort causation doctrines into discrimination law, as evidenced in part by the "robust causality" requirement it imposed for disparate impact claims under the Fair Housing Act. In Caleb's view, the courts are likely to find the causal link between a local government's prior racial discrimination and reparations programs too attenuated to survive scrutiny. Caleb did a stellar job of weaving together legal and philosophical theory, precedent, and details about reparations programs to assess the viability of the programs. The paper was concise, clear, and a pleasure to read.

Caleb's second paper evaluated whether participatory budget programs that many local governments are adopting are a promising tool for achieving racial equity. Again, his attention to the pragmatics of how programs actually work, combined with his keen insights about the limits of participatory budgeting, resulted in an excellent paper. He was careful and thorough in his research for the paper, and astute in his critique.

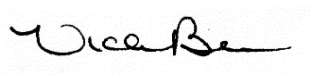
In the next academic year, Caleb will provide research assistance for some of my projects, and write his note about zoning protest petitions, which give landowners abutting an area proposed for rezoning the ability to force a supermajority vote on the zoning change. Caleb's intellectual curiosity, the breadth of his interests, his sharp mind, and his determination to find solutions to critical public policy challenges all make me excited about the chance to work with him on those projects.

Another one of Caleb's "super-powers" is his efficiency and time management skills. He has managed to juggle an impressive range of activities – from serving as executive editor of the Law Review, to participating in the moot court competition, to being a research assistant – all while amassing an impressive record of academic success.

Caleb also is a joy to work with. He has an easy, down-to-earth, and up-beat manner and ready sense of humor. He has a strong sense of ethics and integrity, shows excellent judgment, and is mature and level-headed.

Caleb is one of those students who makes teaching such a great job. His exceptional intelligence and strong writing skills will make him an excellent law clerk. I enthusiastically recommend him to you – he'll be a valued member of your family of clerks.

Sincerely,



Vicki Been

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Brooklyn, NY 11238
ceh8766@nyu.edu
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Writing Sample – Seminar Paper

This writing sample was a paper I submitted for my Theories of Discrimination Law Seminar in Fall 2022, for which I received an A grade. The seminar was taught by Professor Sophia Moreau. The paper is entirely unedited by others and did not receive professor or other feedback.

APPLYING A TORT THEORY OF NEGLIGENT DISCRIMINATION TO MEDICINE: HEADWINDS FOR PLAINTIFFS IN THE PROFESSIONAL MALPRACTICE STANDARD OF CARE

CALEB HERSH

Discrimination law in the United States is becoming increasingly "tortified." It is now unremarkable for courts to analogize the elements of liability under antidiscrimination statutes to those of common-law torts.[1] At a high level, this is a straightforward comparison. Like tort law, discrimination law is often enforced through the private recovery of money damages, and encompasses civil wrongs occurring outside contractual relationships. In practice, though, the importation of tort concepts into discrimination law has served a specific end. As Professor Sandra Sperino notes, the courts have principally imported tort law's liability-*limiting* concepts, and have done so to serve the goal of similarly limiting defendants' liability in discrimination suits.[2] Sperino suggests that civil rights lawyers should respond to this trend by looking to tort concepts to articulate more plaintiff-friendly readings of the two discrimination liability theories—disparate treatment and disparate impact—currently recognized in American law. But other scholars propose something altogether more expansive: that courts should embrace tort concepts to recognize entirely new theories of liability for discrimination. Most prominent among these theories is that of *negligent discrimination*. Whether recognized through statutory interpretation, established through a new common-law tort, or legislatively enacted, negligent discrimination could afford

[1] *See, e.g.*, Staub v. Proctor Hosp., 562 U.S. 411, 417 (2011) (referring to an antidiscrimination statute, the Uniformed Services Employment and Reemployment Rights Act, as "a federal tort" adopted against "the background of general tort law"); *see also* Sandra F. Sperino, *Let's Pretend Discrimination Is a Tort*, 75 OHIO ST. L.J. 1107, 1109–14 (2014) (describing analogies between tort concepts and discrimination law made in recent Supreme Court jurisprudence); Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1419 (2014) (suggesting that tort law is the current "model for civil rights law").

[2] *See* Sperino, *supra* note 1, at 1107; Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 3 (arguing that the importation of common-law proximate cause into employment discrimination jurisprudence is overly liability-limiting).

plaintiffs a private cause of action for many unintentional but discriminatory wrongs that neither discrimination statutes nor tort law currently remedy.[3]

This Comment takes seriously the idea of establishing a negligence theory of discrimination. But the trend toward selectively importing tort law's liability-limiting concepts into discrimination law suggests caution. Any theory of negligent discrimination must account for the range of liability-limiting tort doctrines that could undermine plaintiffs' pursuit of these claims. This Comment accordingly identifies a tort concept that would present a likely headwind for plaintiffs hoping to establish negligent discrimination liability: the deference to professional custom embedded in the standard of care for medical malpractice. It contends that, should courts embrace a theory of negligent discrimination liability, under statute or through the common law, plaintiffs who bring these claims against physicians for discriminatory medical practices that are nonetheless consistent with professional standards would be unlikely to recover given current tort doctrine. Part I discusses the standard of care in medical malpractice cases and describes how it could limit physicians' liability for negligent discrimination. Part II suggests how negligent

[3] *See* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 900 (1993) (proposing a negligence theory of Title VII liability); Rakhi Ruparelia, *"I Didn't Mean It That Way!": Racial Discrimination as Negligence*, 44 SUP. CT. L. REV. 81, 83 (2009) (arguing for a common-law tort of negligent racial discrimination). As both authors note, this is not an improbable idea. Current failure-to-accommodate claims in the context of religious, disability, and pregnancy discrimination under Title VII are "essentially based on" a negligence theory of duty. Oppenheimer, *supra*, at 936; *see also infra* notes 22–23 and accompanying text. Similarly, the Ontario Court of Appeal attempted to establish a common-law tort of discrimination. The Supreme Court of Canada overturned this ruling on appeal, but nonetheless "commended" the lower court for its "'bold' attempt to advance the common law." Ruparelia, *supra*, at 81 (quoting Seneca Coll. of Applied Arts & Tech. v. Bhadauria, [1981] S.C.R. 181, 195 (Can.)).

discrimination theory might account for this built-in liability limitation in the medical context. Part III briefly concludes.

I
NEGLIGENT DISCRIMINATION AND THE MALPRACTICE STANDARD OF CARE

Among the three recognized tort duties that govern medical practitioners' obligations to their patients, malpractice—unlike breach of informed consent or fiduciary duty—uniquely uses a deferential standard of care. As this Part will discuss, malpractice is likely the only doctrine from which a theory of negligent discrimination could be analogized in cases involving the discriminatory delivery of medical treatment. Moreover, a discrimination defendant-friendly court may look to the malpractice standard of care as a limiting principle. Thus, the deferential standard of care afforded to physicians in malpractice cases would become part of the analytical framework from which courts would understand a negligent discrimination tort theory. If then used to set the standard of care for negligent medical discrimination, it could significantly constrain plaintiffs' potential for recovery.

The duty of a physician to obtain informed consent (and against their negligent failure to disclose treatment risks) covers a range of conduct implicating a patient's freedom to choose treatment. But medical discrimination often stems from a physician failing to account for theirs, or their profession's, biases in delivering a *freely chosen* course of treatment. Breach of informed consent is thus too narrow of a tort to properly ground a duty against negligent discrimination.[4]

[4] *See* Mary Crossley, *Infected Judgment: Legal Responses to Physician Bias*, 48 VILL. L. REV. 195, 249 (2003) (discussing how breach of informed consent plaintiffs bear more exacting burdens of proof for causation than do medical malpractice plaintiffs). An additional barrier to analogizing a theory of negligent discrimination to breach of informed consent is that a *discriminatorily* inadequate disclosure of treatment risk may result not from a complete failure to inform, but from a disclosure being packaged in a way that fails to take full account of "cultural and contextual issues" stemming from historic discrimination, which may give a patient reason to distrust the medical profession. McKenzi B. Baker, Note, *Made Whole: The Efficacy of Legal Redress for Black Women who Have Suffered Injuries from Medical Bias*, 57 HARV. C.R.-C.L. L. REV. 321, 351 (2022) (discussing how distrust of the medical profession is a "glaring issue particular to the Black community" that renders breach of informed consent inadequate to remedy medical discrimination).

Nor does breach of fiduciary duty present an appropriate tort duty from which to analogize a negligent discrimination theory. A physician's tortious breach of fiduciary duty to a patient may stem from their negligent failure to disclose personal conflicts of interest.[5] But even if such an obligation could be adapted to require a physician's "self-reflective assessment . . . to identify and screen out any [discriminatory] bias," extending the duty of disclosure to cover discrimination would suggest that the physician could satisfy it by *disclosing their biases to the patient*—a response that is "neither probable nor desirable."[6] That leaves malpractice—the negligent delivery of medical treatment itself—from which to derive a negligent discrimination theory of liability for physicians.

That malpractice is the most appropriate tort from which to analogize negligent medical discrimination is highly consequential for how the standard of reasonable care would be set. In most negligence cases, industry custom can be relevant in determining the reasonableness of an actor's conduct, but on its own cannot conclusively establish whether or not a defendant was negligent.[7] For professional malpractice, however, the standard of care "is to a significant extent defined in terms of professional standards and customs."[8] The elements of tort liability for negligence—a duty of reasonable care, a breach of that duty, and a (factually and proximately) causal relationship between the defendant's breach and the plaintiff's injury[9]—become linked to

[5] *See* Crossley, *supra* note 4, at 250 ("[T]he physician's fiduciary obligation requires, at a minimum, that he inform patients of any subjective motives that might influence his professional judgment.").
[6] *Id.* at 252, 255. Crossley also notes that the doctrine governing physicians' fiduciary duties in tort to their patients is the least developed of the medical tort doctrines. Many courts do not recognize breach of fiduciary duty in medicine as a tort at all, or only recognize it in cases where a physician has acted dishonestly or abusively. *See id.* at 252–53 ("A few courts have given teeth to physicians' fiduciary obligations, but many of these cases have involved physician dishonesty or abuse of power, arguably separate from the physician's actual treatment or diagnosis of the patient.").
[7] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 13(a)–(b) (AM. L. INST. 2010) (stating that an actor's compliance or departure from community custom may be evidence of negligence or non-negligence, but neither precludes nor requires a finding of negligence).
[8] *Id.* § 13 cmt. b.
[9] *See id.* § 6 ("An actor whose negligence is a factual cause of physical harm is subject to liability for any such harm within the scope of liability, unless the court determines that the ordinary duty of reasonable care is inapplicable.").

whether the defendant adhered to professional custom. A medical malpractice plaintiff must therefore demonstrate 1) the basic norms of medical care applicable to the defendant-practitioner, 2) that the defendant deviated from those norms, and, 3) a causal relationship between the *deviation* and the injury.[10]

The headwind that an industry-determined standard of care presents for a negligent discrimination theory is this: many of medicine's discriminatory practices *are* its basic norms.[11] The following hypothetical is illustrative. In pulmonology, a spirometer is a common device used to evaluate lung capacity. Spirometer measurements are routinely "race-corrected" based on incorrect and centuries-old racist assumptions about supposedly innate racial differences in lung capacity.[12] There is no scientifically valid reason to make this correction (nor, for that matter, any scientifically valid means of determining a patient's race).[13] And yet, race-correction is not only standard medical practice, but is "built into the software of [spirometers] globally."[14]

Imagine that a U.S.-based patient is injured after being misdiagnosed because of the race-correction applied to their lung capacity measurement and wants to sue for compensatory damages.

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[10] *E.g.* Lama v. Borras, 16 F.3d 473, 478 (1st Cir. 1994). *But see* Philip G. Peters, Jr., *The Quiet Demise of Deference to Custom: Malpractice Law at the Millennium*, 57 WASH. & LEE L. REV. 163, 163–64 (2000) (suggesting that some states have recently moved away from complete deference to custom and toward a "reasonable physician" standard).

[11] *See, e.g.*, Sidney D. Watson, *Race, Ethnicity, and Quality of Care: Inequalities and Incentives*, 27 AM. J.L. & MED. 203, 205–07 (2001) (outlining ways in which "[r]ace and ethnicity are consistently linked with different and poorer patterns of health access and treatment").

[12] *See, e.g.*, Hamza Shaban, *How Racism Creeps into Medicine*, THE ATLANTIC (Aug. 29, 2014), https://www.theatlantic.com/health/archive/2014/08/how-racism-creeps-into-medicine/378618 (discussing the spirometer issue).

[13] *See id.* (discussing how most physicians surveyed simply assume the patient's race by "eyeball[ing]"). There is some legitimate debate over the utility of the lung capacity assumption as a shorthand to assess *public health*—due to residential segregation, a disproportionate number of people of color in the United States live in higher-pollution areas, which could contribute to aggregate differences in lung capacity. *See id.* (noting that "scientific studies [have shown] that people who live around high pollution areas have lower lung capacity" and that "[h]igh pollution areas also map onto minority status," but "environmental or socioeconomic explanations for differing lung capacity" are, for one reason or another, taken less seriously by physicians than racist assumptions about supposedly innate racial difference). Regardless, there is no scientifically valid reason for an *aggregate* difference caused by discrimination to form the basis of an assumption about an *individual's* biology in the context of an individual health assessment. *See id.* (stating that "the use of race as a social category is entirely appropriate to study the health effects of a discriminatory social world" but completely inappropriate "as a natural/scientific category to study genetic difference").

[14] *Id.*

This plaintiff would have difficulty recovering under a discrimination theory. Discrimination statutes' coverage of medical settings is mixed and complex.[15] Assuming the plaintiff could find a suitable statute under which to bring a claim, proving disparate treatment (the prerequisite for recovering money damages under any applicable statute) would be an uphill battle. Even if the physician's diagnosis was the direct result of the spirometer's assessment, the racist assumption underlying the misdiagnosis was built into the spirometer's functionality, rather than stemming from the physician's own cognitive bias.[16] And even if the physician was consciously aware of the race-correction, many courts have found the "intent" required to establish disparate treatment liability to be something "akin to animus or mens rea"[17]—a narrower standard than just intent to make a diagnosis plus awareness of the race-correction (the analogous tort law intent standard).[18] The doctor's misdiagnosis, in reliance on a racist assumption, is more akin to conduct "that might

[15] Title VI of the Civil Rights Act of 1964, for example, only covers race discrimination in medical settings that receive federal funding, and does not cover other grounds of discrimination. *See* Crossley, *supra* note 4, at 263 ("A patient who believes that her race, color or national origin influenced her physician's choice of her medical treatment may assert that the physician's actions violated Title VI of the 1964 Civil Rights Act."). Moreover, only proof of intentional discrimination (disparate treatment) would entitle the plaintiff to money damages. *See id.* at 268 n.267 (collecting cases). Title IX's prohibition on sex discrimination in education would plausibly cover teaching hospitals, but only covers sex as a protected ground and likely does not extend to patients. *See id.* at 271 ("Title IX's protection from sex discrimination may be limited to students and employees of federally funded education programs."). Section 504 of the Rehabilitation Act of 1973 provides for recovery of money damages for disability discrimination by medical providers receiving federal funding, but has similar limits in scope to Title VI given its federal funding requirement, does not cover grounds other than disability, and requires proof of disparate treatment for a plaintiff to recover money damages. *See id.* at 272–73. Finally, the Americans with Disabilities Act prohibits disability discrimination by health care providers, but is again only limited to disability discrimination, and allows recovery of money damages by individual plaintiffs only against public health care providers. *See id.* at 272–73.

[16] This situation is analogous to a so-called "cat's paw" case, where "a biased individual takes an action against another person based on a protected trait, but an unbiased individual ultimately makes the challenged . . . decision." Sperino, *supra* note 2, at 4. In these cases, however, the focus of the intent analysis is on the actor who made the biased decision beginning the causal chain to the plaintiff's disparate treatment. *See id.* at 5. This creates a problem for the plaintiff in our spirometer hypothetical: Assuming the physician passively accepted the spirometer output as accurate, the biased "decision" was itself made by a machine, which cannot form intent.

[17] Sperino, *supra* note 1, at 1119.

[18] *See* Crossley, *supra* note 4, at 289 (describing how much racial bias in medical decision-making is unconscious and not the result of provable animus).

be deemed 'negligent.'"[19] As the sought-after remedy is money damages, this case presents the type of wrong that a negligent discrimination liability theory might remedy.

This patient's ability to recover for negligent discrimination, however, would run headlong into the same defense the physician would offer had the patient sued for malpractice. Race-corrections in spirometer measurements are customary in medicine. The physician would have no trouble defeating a malpractice claim by showing that they adhered to this professional custom. "[E]ven if the plaintiff [could] show that, but for his race, his doctor would have chosen a different diagnostic approach . . . within the standard of care . . . [that was] more likely to detect his condition," the plaintiff would "still lose because he has not shown the defendant failed to conform to the standard of care."[20] If negligent discrimination in medicine is treated like malpractice, the standard of care would likewise be tied to medical custom. Indeed, the more systematic the discriminatory medical practice, the *less successful* plaintiffs' claims would be, as the standard of care defense would be stronger. A different standard of care is needed for a negligent discrimination theory to give these plaintiffs a shot at recovery.

II
ALTERNATIVES TO THE MALPRACTICE STANDARD OF CARE

If the past twenty years of caselaw is any indication, courts may find it tempting to import the deferential malpractice standard of care to a negligent discrimination tort to limit physicians' liability for medical discrimination.[21] How might theorists of negligent discrimination avoid this trap? This Part poses two possibilities. First, a negligent discrimination theory could allow for a

[19] *Id.* at 288 (quoting Oppenheimer, *supra* note 3, at 967–72).
[20] *Id.* at 247.
[21] *See* Sperino, *supra* note 2, at 50 (discussing how the Supreme Court imported a "vague and amorphous" concept of agency from tort law to limit defendants' liability in employment discrimination cases, and in future cases will likely "find ways to use proximate cause to render summary judgment in favor of the employer, even in cases that should arguably proceed to jury trial").

plaintiff to identify a less discriminatory alternative to a defendant's conduct as a means of proving a breach of the standard of care, even in medical discrimination contexts. Second, negligent medical discrimination could be grounded in an additional tort duty of physicians to abide by their ethical responsibilities, which themselves include an obligation not to discriminate.

The "less discriminatory alternative" test is already built into the elements of disparate impact liability for employment discrimination.[22] As Professor David Oppenheimer notes, this responsibility is essentially a tort duty against negligence. Employers must determine "whether a less discriminatory alternative [selection device] that meets [their] legitimate needs exists," and are liable for failing to do so—that is, for failing to take reasonable care to avoid foreseeable risks in the face of a demonstrably low burden of precaution.[23] The less discriminatory alternative test has the advantage of providing a roadmap for negligent discrimination liability that is both well-established in discrimination law, and well-grounded in tort theory.

Courts may hesitate to adopt this test, however, precisely *because* it tracks the non-deferential reasonable care standard. The professional standard of care has a policy rationale behind it. Judges are reticent to intrude upon the expert judgment of other skilled professionals, and many fear that a less deferential standard would encourage doctors to avoid high-risk, high-reward treatments.[24] Courts may also fear that adopting a less discriminatory alternative test for negligent medical discrimination may encourage malpractice plaintiffs to transform malpractice

[22] Under the 1991 Civil Rights Act, a plaintiff may establish disparate impact liability under Title VII by showing that a less discriminatory employment practice exists that meets an employer's legitimate need, but the employer refused to adopt it. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii); Oppenheimer, *supra* note 3, at 935 ("[E]mployers are . . . liable for the harm caused to women or minority applicants if they adopt a selection device which is discriminatory in its effects when the risk of such a discriminatory result could have been avoided by using a less harmful selection device.").
[23] Oppenheimer, *supra* note 3, at 933; *see* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 cmt. e (AM. L. INST. 2010) ("The actor's conduct is . . . negligent if the magnitude of the risk outweighs the burden of risk prevention.").
[24] *See* Peters, *supra* note 10, at 195 (summing up rationales for the deferential standard as articulated in caselaw); Alex Stein, *Toward a Theory of Medical Malpractice*, 97 IOWA L. REV. 1201, 1205–06 (2012) (same).

claims into discrimination claims. Even if a portion of these discrimination claims turn out to be non-meritorious, some plaintiffs may nonetheless win them because they would be brought in high volume, contemporaneously with most malpractice claims, and would accordingly chip away at the policy behind the deferential standard of care. Practically, this possibility reduces the likelihood that a less discriminatory alternative test could gain traction.

A second possible framework, "ethical malpractice," could ground negligent medical discrimination claims within a tort duty that *embraces* the deferential standard of care. At present, courts reject the idea that professional ethics standards conclusively establish legal duties of care.[25] But as Professor Nadia Sawicki points out, some courts do treat medical ethics rules as relevant evidence in establishing the prevailing medical custom in malpractice cases.[26] For as much as medical discrimination occurs in practice, non-discrimination may be an aspirational ethical principle that is "so well established in modern medical practice" that the common law could plausibly develop to recognize it "as a basis for civil recovery when breaches occur."[27] The advantage of grounding negligent discrimination in an (actionable) ethical obligation is that it does

[25] Nadia N. Sawicki, *Ethical Malpractice*, 59 HOUS. L. REV. 1069, 1101 (2022) ("As a general matter, courts uniformly reject the idea that ethical standards establish a legal duty of care . . . .").
[26] *See id.* at 1108 ("In a substantial number of cases where plaintiffs introduce evidence about the ethical standards of the profession when arguing about the standard of care or breach of duty, courts recognize that these standards may have some legal relevance.").
[27] *Id.* at 1134; *see also AMA Code of Medical Ethics: Opinion 8.5, Disparities in Health Care*, AM. MED. ASS'N, https://code-medical-ethics.ama-assn.org/sites/default/files/2022-08/8.5.pdf (last visited Dec. 5, 2022) (establishing that physicians are ethically obligated to "[e]xamine their own practices to ensure that inappropriate considerations about race, gender identify [sic], sexual orientation, sociodemographic factors, or other nonclinical factors, do not affect clinical judgment").

not require forfeiting the professional standard of care. It merely establishes that the professional standard of care is "imbued with specific and explicit attributes of non-discrimination."[28]

Unfortunately, ethical malpractice is not even close to an established doctrine.[29] Putting it in practice would involve convincing courts to establish a tort duty of physicians to abide by professional ethics rules, in addition to the duty not to discriminate. Which ethics breaches would be independently actionable, and which would not? This would be a thorny question that judges may not wish to resolve for other professionals by fiat, just to allow negligent discrimination claims to proceed. For its advantages over the less discriminatory alternative test in not disrupting settled standard of care doctrine, establishing ethical malpractice as a tort duty on its own may prove more conceptually difficult to implement.

III
CONCLUSION

If the courts recognize a negligence theory of liability for discrimination, importing the malpractice standard of care to this theory in medical settings could prove fatal to the claims of plaintiffs seeking to recover for injuries caused by their physicians' unintentional but discriminatory practices. The existence of this built-in limitation, before even a single court has embraced negligent discrimination, suggests that proponents of a negligent discrimination tort theory must reckon with how liability-limiting tort doctrines operate in practice. A judiciary that is hostile to discrimination plaintiffs already has a full toolbox of tort concepts from which to limit liability. Scholars and practitioners who believe that establishing a tort duty against negligent discrimination could better vindicate the rights of subordinated individuals would do well to prepare some creative responses.

[28] Ruparelia, *supra* note 3, at 100 n.77.
[29] *See* Sawicki, *supra* note 25, at 1133 ("[R]ecognizing ethical malpractice as an independent cause of action may be premature.").

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Date of JD/LLB	**May 5, 2024**
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Moot Court Experience	**Yes**
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June 4, 2023

The Honorable Jamar Walker
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Dear Judge Walker,

I hope this letter finds you well and in good health. I am honored to submit my application for a clerkship within your chambers for the 2024-2025 term. I am a rising 3L student at Northwestern Pritzker School of Law, eager to join your chambers and immerse myself in the intricacies of the law, under your guidance and expertise. I am certain that a clerkship in your chambers would critically shape my understanding of the judicial process and instill in me the highest standards of professionalism and ethics.

In addition to my deep enthusiasm for the clerkship opportunity, I believe my academic experiences at Northwestern have equipped me with a strong foundation to excel in the role. In preparation for a possible clerkship I have immersed myself in a rigorous curriculum, specifically honing my analytical and research skills through the university's Appellate Concentration including coursework focused on litigation, judicial writing, and advocacy. I have also had the privilege of working on a diverse range of projects directly applicable to clerking, including the McGee Civil Rights Moot Court and the MacArthur Justice civil rights litigation clinic, which have sharpened my ability to think critically and communicate effectively in a legal context. Moreover, my involvement with Northwestern's Journal of Human Rights and the Moot Court Society has allowed me to develop leadership skills, work collaboratively with peers on legal research and analysis, and navigate complex challenges with resilience and determination. I am confident that these experiences, combined with my passion for the law and dedication to excellence, will enable me to contribute meaningfully to the work of your chambers and thrive in the demanding and intellectually stimulating environment of a clerkship.

My application includes a resume, law transcript, and writing sample, which is an opinion I wrote as an assignment in "Legal Writing for the Courts." Letters of recommendation are provided from:

Hon. Jennifer M. Gorland, Detroit Immigration Court
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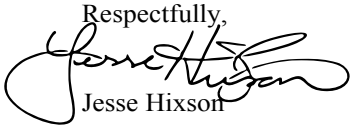
I would welcome the opportunity to interview with you to further discuss my qualifications and interest in the position. Thank you for considering my application.

Respectfully,



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EDUCATION

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- Journal of Human Rights – Deputy Editor-in-Chief
- Moot Court Society – Spring Competitions Director
- MacArthur Justice Center's Civil Rights Litigation Clinic
- William E. McGee National Civil Rights Moot Court Competition
- ACLU – Vice President of Events
- OUTLaw – Member

Arizona State University, Tempe, AZ
Master of Fine Arts in Arts Entrepreneurship and Management, May 2019
Certificate in Nonprofit Leadership and Management, December 2018

- Nu Lambda Mu Nonprofit Honors Society

Harding University, Searcy, AR
Bachelor of Arts in Interdisciplinary Studies, May 2016

- Summa Cum Laude, President's Award, Honors Graduate with Distinction, Honors Scholar
- The Bison Student Newspaper – Business Manager and Reporter
- Omicron Delta Kappa Leadership Society – Member
- Best Advertiser – Southeastern Journalism Conference

EXPERIENCE

Allen & Overy, New York, NY
Summer Associate, May 2023 – July 2023

U.S. Department of Justice – Detroit Immigration Court, Detroit, MI
Legal Intern, June 2022 – August 2022

- Wrote judicial opinions and decisions on various applications for relief before the Court (*samples available)*
- Researched new and emerging immigration issues for the Immigration Judges
- Observed numerous merit hearings and discussed and analyzed cases with the Immigration Judges

Disney Theatrical Group, New York, NY
Executive Assistant, Domestic Tours and Regional Engagements, July 2019 – January 2021

- Managed and processed $10 million of invoices per year
- Coordinated travel and managed expenses for three executives and Broadway talent
- Sourced, ordered, and maintained stock of promotional merchandise for Disney's touring shows
- Tracked marketing accounts payable and receivable for three national tours

Arizona State University, Tempe, AZ
Faculty Associate, August 2019 – May 2020

- Taught an upper-level section of Management in the Arts
- Gave an introduction into the legal, political, and economic landscape of arts and nonprofits in the United States

Artivate: A Journal of Arts Entrepreneurship, Fayetteville, AR
Editorial Assistant, July 2017 – May 2020

- Copy-edited and typeset two nationally circulated 80-page editions each year
- Managed the layout and style of the journal as well as workflow and communication between authors and editors

ADDITIONAL INFORMATION

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Program: Juris Doctor
07/28/2021: Active in Program

Beginning of Law Record

2021 Fall (08/30/2021 - 12/16/2021)

Course	Description	Attempted	Earned	Grade	Points
BUSCOM 510	Contracts	3.000	3.000	A	12.000
Instructor:	Jide Nzelibe				
CRIM 520	Criminal Law	3.000	3.000	A-	11.010
Instructor:	Meredith Rountree				
LAWSTUDY 540	Communication& Legal Reasoning	2.000	2.000	A	8.000
Instructor:	Rebekah Holman				
LITARB 530	Civil Procedure	3.000	3.000	A-	11.010
Instructor:	Zachary Clopton				
PPTYTORT 550	Torts	3.000	3.000	A-	11.010
Instructor:	Ezra Friedman				

Term Honor: Dean's List

		Attempted	Earned	GPA Units	Points
Term GPA	3.788 Term Totals	14.000	14.000	14.000	53.030
Cum GPA	3.788 Cum Totals	14.000	14.000	14.000	53.030

2022 Spring (01/10/2022 - 05/05/2022)

Course	Description	Attempted	Earned	Grade	Points
CONPUB 500	Constitutional Law	3.000	3.000	A	12.000
Instructor:	Erin Delaney				
CONPUB 610	First Amendment	3.000	3.000	A	12.000
Instructor:	Jason DeSanto				
CONPUB 644	Legislation	3.000	3.000	A-	11.010
Instructor:	Ellen Mulaney				
LAWSTUDY 541	Communication& Legal Reasoning	2.000	2.000	B+	6.660
Instructor:	Rebekah Holman				
PPTYTORT 530	Property	3.000	3.000	B+	9.990
Instructor:	Peter DiCola				

Term Honor: Dean's List

		Attempted	Earned	GPA Units	Points
Term GPA	3.690 Term Totals	14.000	14.000	14.000	51.660
Cum GPA	3.739 Cum Totals	28.000	28.000	28.000	104.690

2022 Fall (08/29/2022 - 12/15/2022)

Course	Description	Attempted	Earned	Grade	Points
LITARB 605	Trial Advocacy ITA	4.000	4.000	A-	14.680
Instructor:	Joshua Jones				
LITARB 606	Evidence (ITA)	3.000	3.000	B+	9.990
Instructor:	Joshua Jones				
LITARB 607	Legal Ethics (ITA)	3.000	3.000	A	12.000
Instructor:	Wendy Muchman Mary Foster				
LITARB 621	Appellate Advocacy	3.000	3.000	A-	11.010
Instructor:	Meredith Rountree				
LITARB 721	Clinic:Civil Rights Litigation	4.000	4.000	A	16.000
Instructor:	David Shapiro Vanessa del Valle Alexa Van Brunt				

Term Honor: Dean's List

		Attempted	Earned	GPA Units	Points
Term GPA	3.746 Term Totals	17.000	17.000	17.000	63.680
Cum GPA	3.742 Cum Totals	45.000	45.000	45.000	168.370

2023 Spring (01/09/2023 - 05/04/2023)

Course	Description	Attempted	Earned	Grade	Points
CONPUB 600	Administrative Law	3.000	3.000	A-	11.010
Instructor:	James Speta				
CONPUB 755	Global Freedom of Expression	2.000	2.000	A	8.000
Instructor:	Doreen Weisenhaus				
CRIM 610	Constitutional Crim Procedure	3.000	3.000	A-	11.010
Instructor:	Meredith Rountree				
LAWSTUDY 615	Law and Rhetoric	2.000	2.000	A	8.000
Instructor:	James Lupo				
LAWSTUDY 628	Writing for the Court	2.000	2.000	A	8.000
Instructor:	Janet Brown				
LITARB 608	Litigation,Crises & Strat Comm	2.000	2.000	A	8.000
Instructor:	Harlan Loeb				

Term Honor: Dean's List

		Attempted	Earned	GPA Units	Points
Term GPA	3.859 Term Totals	14.000	14.000	14.000	54.020
Cum GPA	3.769 Cum Totals	59.000	59.000	59.000	222.390

End of School of Law Official Transcript

NORTHWESTERN PRITZKER SCHOOL OF LAW

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing this letter in enthusiastic support of the application of Jesse Hixson for a judicial clerkship. I came to know Jesse over the past year, first as an exceptional high-achieving student in my course, Global Freedom of Expression and the Press, and then through our many substantive conversations outside the classroom. He impressed me with his intelligence, curiosity, and passion for learning.

My course examines how courts, legislatures, and policymakers around the world grapple with new and troubling issues in expression and press freedom in a highly digitized era. Its main assessment – a major paper – demands that students analyze some of the most difficult and novel legal questions in jurisprudence today. Utilizing extensive research, analytical, and writing skills, Jesse produced a comprehensive examination of the state of SLAPP suits and legislation in the US, concluding that the mix and match of state laws has resulted in the widespread extortion and suppression of press organizations, journalists and activists. The highly persuasive paper proposed a federal anti-SLAPP law with provisions to allow plaintiffs to seek wide ranging subpoenas on non-party actors and additional damages. His clear, concise, and cogent paper was among the best of this course, and further evidence of his academic accomplishments, which also include his role as Deputy Editor-in-chief of the Journal of Human Rights and his work for the MacArthur Justice Center Civil Rights Litigation Clinic.

Scholarship aside, Jesse is very personable, mature, and energetic – qualities reflected in the leadership role he assumed in classroom discussions that engaged and inspired other students to participate. His dedication and hard work, as also illustrated by his previous achievements as a legal intern for the Detroit Immigration Court and at the Disney Theatrical Group, are fundamental to his success.

As a law academic with several leading books on global media law and policy, as a former prosecutor, and as a former legal editor and city editor of The New York Times, I have known many law students and young lawyers. I have no doubt that Jesse will be an exceptional law clerk in whatever chambers he works for and an outstanding attorney. It is my honor and pleasure to recommend him.

Respectfully,

Doreen Weisenhaus
Senior Lecturer
Northwestern Pritzker School of Law
Senior Lecturer and Director, Media Law and Policy Initiative
Medill School of Journalism, Media, Integrated Marketing Communications

Doreen Weisenhaus - doreen.weisenhaus@law.northwestern.edu - (312) 503-7810

U.S. Department of Justice

Executive Office for Immigration Review

Immigration Court

P.V. McNamara Federal Building
477 Michigan Avenue, Suite 440
Detroit, Michigan 48226

April 10, 2023

To Whom It May Concern:

Jesse Hixson assisted me with cases as a Legal Intern with the Detroit Immigration Court in the summer of 2022. Given his qualifications, I had been expecting someone with excellent research and writing skills, but Jesse exceeded my expectations in his level of judgment, sophistication, and maturity about the emerging legal and factual issues attendant in cases that arise from ongoing political, social and economic strife around the world. His questions, his observations and our discussions regarding cases all reflected careful and caring insight about each case. It can be easy to characterize cases in a generic manner and excessively rely on templates to generate written decisions, but I did not see that in Jesse's work.

Aside from his work, Jesse was an extremely positive and team-oriented person, who related well to everyone. I would describe him as a quick study, who got his work done efficiently and by requested due dates. He was observant of rules, procedures, and security measures.

I would love to see Jesse back at the Immigration Court, but I suspect he has greater legal roles ahead of him. I would be happy to speak with you further about Jesse's work at the Court – best is my cell (248) 229-5977.

Sincerely,

Jennifer M. Gorland
Immigration Judge

NORTHWESTERN PRITZKER SCHOOL OF LAW

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to recommend Jesse Hixson to you. I taught Mr. Hixson criminal law during the Fall of his 1L year. This Fall, he was in my Appellate Advocacy class, and this Spring, he enrolled in my Constitutional Criminal Procedure class, which surveys the constitutional regulation of the police via the Fourth, Fifth, and Sixth Amendments. He earned an A- in each class. Each class was very competitive and these grades reflect his excellent work.

Starting in the fall of his first year, Mr. Hixson made strong contributions to classroom discussions. In both doctrinal classes, he demonstrated a thoughtful understanding of the material. It was in Appellate Advocacy, however, where I was able to work most closely with him. This is a small, writing-intensive simulation course where students research a pair of legal issues, draft an appellate brief, and present oral argument. Mr. Hixson's class worked with a lightly edited transcript of a suppression hearing that required the students to research Texas law interpreting *Pennsylvania v. Muniz* and apply Texas law regarding knowing, voluntary, and intelligent waivers.

In the Appellate Advocacy class, Mr. Hixson demonstrated he is a very strong writer and oral advocate. In addition, in the class discussions regarding how to argue the different legal points and address cases seemingly adverse to either the appellant or appellee position, Mr. Hixson's contributions were uniformly outstanding. He quickly mastered the appellate record in the case and was the first to catch some crucial details – in this case, discrepancies in the testimony regarding the questions asked of the defendant when he was booked into jail. In addition, he reads cases in a sophisticated way. In our discussions, his comments reflected how he appreciated both the nuance in the cases, as well as how they fit into the larger trends in the caselaw.

If you have any questions about Mr. Hixson, please do not hesitate to contact me. I believe he would be an outstanding addition to your chambers.

Respectfully,

Meredith Martin Rountree
Senior Lecturer
Northwestern Pritzker School of Law

Meredith Rountree - meredith.rountree@law.northwestern.edu - (312) 503-0227

JESSE M. HIXSON
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Writing Sample

This writing sample is a judicial opinion that I wrote as an assignment in "Legal Writing for the Court" at Northwestern Law. The professor has approved my using this document as a sample of my writing. The opinion decides an appeal that raises several evidentiary and procedural issues. This sample has received no outside editing.

In the

United States Court of Appeals

For the Seventh Circuit

No. 22-2067

KAREN HIRLSTON,

Plaintiff-Appellant,

v.

COSTCO WHOLESALE CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Indiana.
No. 1:17-cv-04699-TWP – **Tanya Walton Pratt**, *Judge.*

ARGUED FEBRUARY 7, 2023 – DECIDED APRIL 4, 2023

Before HAMILTON, BRENNAN, JACKSON-AKIWUMI, *Circuit Judges*

HAMILTON, *Circuit Judge*. The case before us arises out of an employment discrimination suit by Karen Hirlston, against her former employer, wholesale retail giant, Costco. On appeal, rather than relitigating any of the substantive discrimination and retaliation claims she originally brought against Costco, Hirlston instead

alleges several evidentiary and procedural errors made by the district court that she believes misled the jury, affected her substantial rights, and resulted in verdicts in favor of Costco. The judicial errors Hirlston complains of primarily fall into two categories: jury instructions and evidentiary rulings.

Hirlston first argues that the district court's Jury Instruction 19 and special verdict form (specifically Question 1) contained phrasing that misstated the relevant employment discrimination laws, confusing the jury and misleading them to find in favor of Costco on her discrimination claim. Hirlston further asserts that she was not given an opportunity to object to the erroneous wording included in either the instructions or special verdict form before they were presented to the jury. Hirlston next argues that the district court erred by admitting into evidence two photographs of her Costco workstation as they were not introduced by Costco until after the close of discovery and they were admitted without proper foundation.

After the jury found for Costco on her discrimination claims, the court subsequently found for Costco on Hirlston's retaliation claims. Hirlston alleges the aforementioned errors necessarily resulted in an adverse ruling by the district court on her retaliation claim as the court's decision was tainted by the errors and predicated on a faulty jury finding. We disagree and affirm the district court's ruling in full.

I. Background

In December 2017, Karen Hirlston brought suit against her employer, Costco, where she worked as a manager in the store's Optical Department. In the suit, Hirlston alleged that Costco, in violation of the Americans with Disabilities Act (ADA), had discriminated against her by failing to provide her with reasonable accommodations and that they then retaliated against her for

requesting accommodations. A jury heard Hirlston's discrimination claims while the district court alone ruled on her retaliation claim. At the conclusion of the trial, the jury returned a verdict in Costco's favor on the discrimination claims which subsequently led to the district court also finding in favor of Costco on the retaliation claim. Following the verdicts, Hirlston filed a motion with the district court for a new trial under Rules 59 and 60 of the Federal Rules of Civil Procedure. The district court denied her motion for a new trial. Hirlston now appeals both verdicts and the denial of a new trial to this Court.

During the trial, *both* parties attempted to introduce photographic evidence into the record that had not previously been disclosed to the other side during discovery. Hirlston introduced three photographs of the Optical Department from different angles which Costco objected to on lack of foundation grounds. The district court overruled Costco and allowed the photos to be introduced. Costco then introduced two photographs of the Optical Department desks and cubbies from different angles which Hirlston first objected to for being untimely according to the court's trial order. Hirlston argued that the trial order stated both parties should submit their demonstrative exhibits by June 4. The court overruled Hirlston's objection regarding timeliness, stating that she misunderstood the court's trial order which was only a deadline for demonstratives to be used during opening statement. Appellee Br. 20; App. 213. Hirlston raised a second objection to the photos on lack of foundation grounds. *Id*. The district court overruled Hirlston's foundational objection and admitted Costco's photographs into evidence. *Id*.

At the close of trial, the court discussed with the parties the jury instructions that were proposed by both sides. On Jury Instruction 19, which defined the word "qualified," both parties submitted substantially similar instructions. The only difference between the

two was in the last sentence of the instruction. Hirlston's instruction ended with the phrase "with or without the accommodations she proposed of a grabber, a chair with a back, and periodic lifting assistance." Appellee Br. 21. Costco's instruction ended with the phrase "with or without a reasonable accommodation." To utilize the language of both sides, the court proposed combining the sentences to read "with or without the accommodations she proposed at the November 15 job assessment meeting." *Id*. at 22. At the court's proposal, Hirlston objected, stating that she had reconsidered her position and now preferred Costco's original instruction, excluding "she proposed..." Costco did not object to Hirlston's request as this was in line with their original proposition.

After this discussion, the court emailed both parties a final version of the jury instructions to review. The court gave both parties a 33-minute recess to review the instructions, Appellee Suppl. App. 219. The instructions emailed to the parties included the Court's proposed Instruction 19 which read "with or without the reasonable accommodations she proposed," Appellee Br. 23. When it reconvened, the court asked both parties if they had had a chance to review the instructions, to which Hirlston replied she was reviewing Instruction 19. *Id*. The court responded by orally stating to both parties that it had "only" removed from Jury Instruction 19 the phrase "at the November 15 job assessment meeting." *Id*. at 24. Hirlston did not object to Instruction 19 but objected to a number of the other final instructions.

Also at the close of trial, the court discussed with the parties their proposed jury verdict forms. Both parties proposed different language on Question 1 of the verdict form. The court noted that it believed Costco's form tracked the elements of the jury instructions, while Hirlston's proposed form was a much shorter version. Hirlston objected stating that she believed Costco's form did not track the elements because it included a reference to Costco's "good faith

effort" damages defense. She further stated, in defense of her shorter form, that she believed the verdict form did not need to track the elements as the court had already given the jury the elements in the jury instructions. Hirlston did not lodge a specific objection to Costco's Question 1 or the words therein.

Following this exchange, the court gave the parties a five-minute recess to agree on a verdict form. However, the parties were unable to come to an agreement and so the court formulated its own form by combining the language of both parties to track the elements. The court fully adopted the original wording of Costco's Question 1.

II. Discussion

We review the denial of a motion for a new trial for abuse of discretion. *Pickett v. Sheridan Health Care Ctr*., 610 F.3d 434, 440 (7th Cir. 2010). Under this standard, a reversal is only appropriate if "the verdict is against the weight of the evidence, the damages are excessive, or if for other reasons the trial was not fair to the moving party." *Id*. However, even if we find there was an error at the district court, a reversal is not required if the error was harmless. *Romero v. Cincinnati Inc.*, 171 F.3d 1091, 1096 (7th Cir. 1999); Fed. R. Civ. P. 61. The specific standard of review for each of the errors Hirlston alleges is set forth below.

A. Jury Instruction 19

Hirlston alleges that the district court's inclusion of the phrase, "she proposed" in Jury Instruction 19 was a misstatement of the law that misled the jury and affected her substantial rights. We disagree. Furthermore, we find that she is precluded from raising this argument on appeal under the invited error doctrine.

Hirlston failed to make a timely objection to the inclusion of this phrase during trial and as such, the jury instruction is only entitled

to review for plain error. *Ammons-Lewis v. Metro. Water Reclamation Dist. of Greater Chicago*, 488 F.3d 739, 751 (7th Cir. 2007); Fed. R. Civ. P. 51. To warrant reversal under the plain error standard, there must be (1) an error, (2) that is plain, (3) that affects substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Gee*, 226 F.3d 885, 894 (7th Cir. 2000). However, because Hirlston invited the error she now complains of, not even a plain error review will permit us to reverse. *Naeem v. McKesson Drug Co.,* 444 F.3d 593, 609 (7th Cir. 2006).

We apply the invited error doctrine when an appellant complains of an error that they "committed, invited, induced the court to make, or to which it consented." *Weise v. United States*, 724 F.2d 587, 590 (7th Cir. 1984). We have previously applied the doctrine to the review of jury instructions when an appellant has invited error in the final instructions through its own proposed jury instructions. *United States v. Muskovsky,* 863 F.2d 1319, 1329 (7th Cir. 1988). (applying the doctrine to "prevent defendants from complaining of jury instructions which were substantially similar to the instructions they had submitted").

Here, the portion of Jury Instruction 19 which Hirlston now challenges – 'she proposed' – was language introduced to the court by Hirlston herself. Thus, this phrase was only included in the final jury instructions because Hirlston suggested it to the court. Hirlston not only invited the error, but she also then consented to the error by failing to object to the inclusion of the phrase in the final instructions. The invited error doctrine prohibits Hirlston from now attacking an instruction she was a proponent of. *Williams v. Boles*, 841 F.2d 181, 184 (7th Cir. 1988).

Even if the invited error doctrine did not preclude Hirlston from challenging Jury Instruction 19, we do not find the instruction to

contain a clear or obvious error that affects Hirlston's substantial rights. Though Hirlston claims Jury Instruction 19 ignores the interactive process between employer and employee as required by the ADA, we do not review individual jury instructions in isolation; rather we review jury instructions as a whole to determine if the law is accurately conveyed to the jury. *Ammons-Lewis*, 488 F.3d at 751.

Reviewing the instructions as a whole reveals that the interactive process was clearly and explicitly explained to the jury. For example, Instruction 20 details Costco's continuing duty to provide a reasonable accommodation, Appellee Br. 41. Furthermore, Instruction 21 states that the employer is *required to discuss with the employee* possible reasonable accommodations. *Id*. Thus when read as a whole, the instructions properly detail that Costco had a duty to accommodate Hirlston and to engage in discussions with her in search of a reasonable accommodation. Therefore, even if Jury Instruction 19 omits language about an interactive process, that idea is not absent from the instructions overall.

Finally, it is important to note that Jury Instruction 19 tracks this Court's pattern jury instructions regarding ADA claims. Specifically, Seventh Circuit Pattern Jury Instruction No. 4.05 indicates that the instruction should "describe [the] requested accommodation." In this case, the only accommodations available for the jury to contemplate were those proposed by Hirlston, as Costco did not propose any. Hirlston made this clear to the jury throughout the trial, consistently reminding them that the only accommodations were those proposed by Hirlston. The inclusion of the "she proposed" language is an appropriate description of the requested accommodations in this case and would not have led to jury confusion. Thus, none of Hirlston's arguments demonstrate how Instruction 19 was an error that "seriously affects the fairness,

integrity, or public reputation of judicial proceedings." *Gee*, 226 F.3d at 894.

B. Special Verdict Form

Hirlston argues that the omission of the phrase "with or without the reasonable accommodations" from Question 1 of the special verdict form was in error. According to Hirlston, this was an error because without this phrase, Question 1 does not appropriately track the elements of Jury Instruction 19. However, we disagree and further find that Hirlston is precluded from raising this argument on appeal. When an appellant properly objects to a special verdict form at trial, we review a challenge to the form on appeal for abuse of discretion. *U.S. Fire Ins. Co. v. Pressed Steel Tank Co.*, 852 F.2d 313, 316 (7th Cir. 1988). However, when an appellant fails to properly object to a special verdict form at trial, as is the case here, they have waived the challenge on appeal. *Robinson v. Perales*, 894 F.3d 818, 827 (7th Cir. 2018); *MMG Fin. Corp. v. Midwest Amusements Park, LLC*, 630 F.3d 651, 659 (7th Cir. 2011).

Though Hirlston argues that she was not given an opportunity to object to the final version of the special verdict form, the record does not support this assertion. In fact, both parties were given ample time to read and object to both parties' proposed forms, Appellee Suppl. App. 237-240. Included in the forms Hirlston reviewed was the *exact* wording of Question 1 which she now objects to. While Hirlston did lodge a general objection to the forms for not tracking the elements of the Court's jury instructions, she did not object to Question 1 specifically or suggest, as she does now, that it should have included the phrase "with or without reasonable accommodation." *Id*. at 238. Because Hirlston did not object to the special verdict forms on the grounds she now argues, she has waived the argument on appeal. *Midwest Amusements Park, LLC,* 630 F.3d at 659.

To be clear, even if Hirlston was not precluded from making this argument on appeal, we find no error with the final version of the special verdict form. Hirlston argues that the forms were confusing and misleading because they omitted the phrase "with or without reasonable accommodation," However, as she points out in her own argument, this language was included and defined elsewhere in the district court's jury instructions. Thus, when viewed as a whole, the jury was given the proper instructions by the district court, as the phrase "with or without reasonable accommodation" was seemingly only excluded from this one discreet aspect of the overall instructions delivered to the jury. Furthermore, the formulation of Question 1 used by the district court tracks the pattern jury instruction used by this Court, Appellee Br. 50. Our own pattern instructions also omit the phrase "with or without reasonable accommodations." We cannot then find that the district court abused its discretion by following our lead.

C. The Evidentiary Ruling on Costco's Two Photos

Though she herself successfully introduced photographs after discovery and court deadlines, Hirlston argues that the admission of Costco's photographs was in error because they were produced after discovery and after the district court's deadline for demonstrative exhibits had passed. Hirlston also argues the photos were admitted without a proper foundation. However, we find no error.

We review challenges to the district court's evidentiary rulings for abuse of discretion. *United States v. McClurge*, 311 F.3d 866, 872 (7th Cir. 2002). Under the abuse of discretion standard, we will reverse the decision only if no reasonable person could take the position of the trial court. *United States v. Trudeau*, 812 F.3d 578, 590 (7th Cir. 2016). Even still, a remedy is available only if there is a significant chance that the error affected the outcome of the trial.

Hasham v. California State Bd. of Equalization, 200 F.3d 1035, 1048 (7th Cir. 2000).

The district court was within its discretion to admit Costco's photos into evidence and their admission did not affect Hirlston's substantial rights. Hirlston first argues that the photos should not have been allowed as a demonstrative exhibit because they were produced after the trial court's June 4 deadline for demonstrative exhibits had passed. However, this claim is easily disproven by the record. When Hirlston raised the same claim during the trial, the court told her that the June 4 deadline was only for demonstrative exhibits to be used during opening statements, not during trial.

Hirlston further argues the district court was incorrect in finding proper foundation had been laid for the two photos. According to Hirlston, Donaldson's testimony was too equivocal to properly prove that the photos were taken in Summer 2020 or that they accurately represented the Optical Department as it was in 2015 when Hirlston was working there. While reading the transcript of Donaldson's testimony does not inspire the utmost confidence in the accuracy of his answers, the abuse of discretion standard requires much higher scrutiny than mere doubt. *McClurge*, 311 F.3d at 872. Instead, it asks whether a reasonable person could take the position of the district court after hearing Donaldson confirm the time the photos were taken and explain why the photos were an accurate representation of the Optical Department in 2015. *See Id*. Especially when considering the district court's superior ability to determine the credibility of witness testimony, we find that a reasonable person could take the same position and thus the district court did not abuse its discretion by admitting the photos over Hirlston's objections to lack of foundation. *See United States v. French*, 291 F.3d 945, 951 (7th Cir. 2002).

Finally, Hirlston argues that because the photos were not produced during discovery, they should not have been admitted into evidence. Hirlston rightly argues that the photos should have been excluded under the district court's Oct. 13, 2020 *Orders on Motions in Limine*, granting Hirlston's motion to exclude from trial any documents that Costco failed to produce during discovery that it should have. However, Hirlston did not object to the photos on either of these grounds at trial and because "a party may not raise an issue for the first time on appeal," she has therefore waived raising this objection. *Williams v. Dieball*, 724 F.3d 957, 961 (7th Cir. 2013). Hirlston argues that because she objected to the evidence on foundational grounds at trial, she has properly preserved the issue for review. However, this is a misstatement of the law. The Federal Rules of Evidence do not allow a litigant to raise new objections on appeal that differ from those presented at the trial level. *United States v. Field*, 875 F.2d 130, 134 (7th Cir. 1989). Therefore, we find Hirlston is precluded from making this argument on appeal.

Even still, we find that the admittance of the photos into evidence did not affect the outcome of the trial or prejudice the jury against Hirlston. Hirlston argues that Costco used the two photos to demonstrate how Hirlston was unable to do her job even with her proposed accommodations. Hirlston further argues that because the jury decided each claim by determining Hirlston was unable to do her job, these photos go to the heart of the only issue decided by the jury and thus adversely affected the outcome of the trial. While it may be true that the photos and the testimony they elicited influenced the jury, that does not then establish that the jury would have found Costco's argument significantly less persuasive without them as required by the standard of review. In fact, the record suggests that the exclusion of the two photographs would not have changed the outcome of the trial.

We find the photos to be cumulative of other properly admitted evidence. Even if the photos were *improperly* admitted (which they were not), improperly admitted evidence that is merely cumulative of properly admitted evidence is generally seen as harmless. *Jordan v. Binns*, 712 F.3d 1123, 1138 (7th Cir. 2013). During the trial, the jury heard detailed testimony from several employees describing the layout of the Optical Department as depicted in the two photos, Appellee Br. 61. The jury also saw a demonstrative of the Department's layout which provided a visual depiction of the size and placement of the cubicles in the photos. *Id.* at 62. Thus, any information provided by the photos was also provided in several other testimonies and exhibits, rendering its individual effect on the trial null.

Furthermore, the two photos were used to demonstrate Hirlston's inability to complete only *one* of her job functions with an accommodation. The rest of the trial included ample testimony and evidence regarding Hirlston's inability to complete many of her other job duties with various other proposed accommodations. When the jury determined that Hirlston was not able to perform her job, they were considering all of Hirlston's job functions and proposed accommodations, not just the job functions involving the grabber. This further shrinks the possibility that the two photos had a significant chance of affecting the outcome of the trial, as the jury still would have very likely found Hirlston unable to perform several other essential job functions regardless of the photos' admission. Thus, even if Hirlston had properly preserved this argument for appeal, the admittance of the photos did not affect her substantial rights or the outcome of the trial.

D. The District Court's Ruling on Hirlston's Retaliation Claim

Hirlston's appeal on her retaliation claim is predicated on her other three arguments succeeding. Thus, because we find that there

were no tainted jury instructions, verdict forms, or improperly admitted evidence, then Hirlston's argument that the retaliation claim was tainted automatically fails as well.

III. Conclusion

This Court affirms the district court's denial of Hirlston's motion for a new trial. The Court further affirms the jury verdict on Hirlston's discrimination claim and the district court's verdict on Hirlston's retaliation claim as Hirlston has failed to demonstrate that any of the district court's decisions she now appeals were in error.

AFFIRMED.

Applicant Details

First Name	**Sara Alisa**
Last Name	**Hoban**
Citizenship Status	**U. S. Citizen**
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Address	**Address** **Street** **10800 Ariock Lane** **City** **Austin** **State/Territory** **Texas** **Zip** **78739** **Country** **United States**
Contact Phone Number	**5126531445**

Applicant Education

BA/BS From	**Brown University**
Date of BA/BS	**May 2019**
JD/LLB From	**Stanford University Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90515&yr=2011**
Date of JD/LLB	**June 10, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Marion Rice Kirkwood Memorial Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

S. ALISA HOBAN
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June 12, 2023

The Honorable Jamar Walker
United States District Court
for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker,

I am a rising third-year student at Stanford Law School and write to apply to serve as your law clerk in 2024-2025. I am the first in my family to attend law school, and I came to Stanford Law to pursue a career as a public defender. I have continued to pursue that goal throughout law school but have also gained an interest in protecting the rights of individuals and families through complex litigation. Your mentorship would be invaluable to me given your own career path in criminal law as an AUSA. I would be especially excited to learn your perspective on how judges navigate difficult legal issues while maintaining a fair, even handed approach to the law.

Throughout law school, working directly with clients has shown me firsthand the importance of careful application of the law—an importance matched only by the need to treat vulnerable individuals with dignity and respect. For example, in Stanford's Community Law Clinic, I further developed my passion for legal research and advocacy by representing clients in unlawful detainer suits and social security administration hearings. Equally meaningful has been my participation in Stanford's Three Strikes Project, through which I drafted a habeas petition on behalf of a client serving a 25-to-life sentence. These experiences cemented my belief in the power of combining detail-oriented legal research with centering the humanity of every individual pursuing their day in court. It would be an honor to work in your chambers, particularly given your dedication to upholding the rights and dignity of all.

Enclosed please find my resume, references, law school transcript, and writing sample for your review. Professor David Sklansky, Professor Robert Weisberg, and Professor Michael Romano are providing letters of recommendation in support of my application.

I welcome the opportunity to discuss my qualifications further. Thank you for your consideration.

Sincerely,

Alisa Hoban

S. ALISA HOBAN

10800 Ariock Lane, Austin, TX 78739 | alisah@stanford.edu | 512-653-1445

EDUCATION

Stanford Law School, Stanford, CA — Juris Doctor, expected June 2024

Honors: Leon M. Cain Community Service Award (awarded for strengthening the community through leadership and care); John Hart Ely Prize for Outstanding Performance in Lawyering for Change

Activities: Kirkwood Moot Court (participant); Fresh Lifelines for Youth (volunteer); Stanford Law Association (Vice President of Academic Affairs); Stanford Latinx Law Student Association (Vice President, Community Development); Women of Color Collective (member)

Publications: *The Value of Relentless Efforts to Organize for Abolition in the South*, student note selected for publication by the Stanford Journal for Civil Rights and Civil Liberties in 2024

Brown University, Providence, RI — Bachelor of Arts in Political Science, May 2019

Honors: International Honors Program (Human Rights, Nepal, Jordan, and Chile, Spring 2018)

Activities: Brown Dining Services (Employee); Swearer Center for Student Engagement Committee (Member); ESOL Childcare (Volunteer); Algebra in Motion (Volunteer)

EXPERIENCE

Public Defender Service for the District of Columbia — *Summer Law Clerk*, June – Aug. 2023

- Represent youth in disciplinary hearings, draft pleadings for court reviews, and assist with legal research.

Stanford Community Law Clinic — *Clinical Student*, Jan. 2023 – Present

- Served as co-representative for clients under supervision of Mills Legal Clinic attorneys.
- Conducted direct examination of client and closing arguments during administrative hearing to obtain social security benefits; researched affirmative defenses, filed answers, and negotiated settlement agreement with opposing counsel in unlawful detainer suits; performed legal research on post-conviction relief statutes.

Professor Lawrence Marshall, Stanford Law School — *Research Assistant*, Aug. 2022 – Dec. 2022

- Conducted legal research for Professor Lawrence Marshall, co-founder and former legal director of the Center on Wrongful Convictions, on the successful movement to abolish the death penalty in Illinois

Federal Defenders, Eastern District of New York, — *Legal Intern*, June – Aug. 2022

- Prepared motion for early termination of supervised release. Drafted deferred prosecution memorandum. Assisted in preparing cross examination, witness lists, and reviewed discovery for violation of supervised release hearing. Prepared legal research and initial drafts of motions *in limine.*
- Attended arraignments, sentencing hearings, bail hearings, and pleas.
- Conducted long-term legal research projects related to the legislative history of certain statutes.

U.S. Department of Justice, Antitrust Division *Paralegal Specialist, Criminal Section*, Aug. 2019 – June 2021

- Supported trial attorneys by assisting in investigations, performing legal research, and maintaining document databases. Prepared memoranda on proffers, plea negotiations, and subpoena compliance.

Washington Legal Clinic for the Homeless — *Volunteer*, Sept. 2019 – June 2021

- Conducted client intake interviews at shelter sites in Washington, D.C. Provided clients with resource guides and referrals to relevant organizations.

Brown Refugee Youth Tutoring and Enrichment (BRYTE) — *Director, Tutor*, Jan. 2016 – June 2019

- Co-directed Brown's largest volunteer organization of 167 members. Held meetings with advisors, coordinated trainings, organized outreach and recruitment, and managed community events.

Refugee and Immigrant Center for Education and Legal Services — *Legal Intern,* June – Aug. 2018

- Assisted attorneys in completing immigration relief materials including asylum claim applications, special immigrant juvenile status visas, and residency applications. Researched country conditions for asylum claims; accompanied clients to immigration appointments.

LANGUAGE

Spanish (professional proficiency)

S. ALISA HOBAN

10800 Ariock Lane, Austin, TX 78739 | alisah@stanford.edu | 512-653-1445

RECOMMENDERS

Professor Robert Weisberg
Stanford Law School
(650) 723-0612
weisberg@law.stanford.edu

Professor David Sklanksy
Stanford Law School
650-497-6580
sklansky@stanford.edu

Professor Michael Romano
Stanford Law School
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REFERENCES

Karume James
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karume_james@fd.org
718-330-1206

Juliet Brodie
Stanford Law School, Director of the Stanford Community Law Clinic
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650-724-2507

Lauren Zack
Stanford Community Law Clinic, Supervising Attorney
lzack@law.stanford.edu
650-725-0927

Leland Stanford Jr. University
School of Law
Stanford, CA 94305
USA

Law Unofficial Transcript

Name : Hoban,Alisa
Student ID : 06485059

Print Date: 05/22/2023

--------- Academic Program ---------

Program : Law JD
09/20/2021 : Law (JD)
Plan
Status Active in Program

--------- Beginning of Academic Record ---------

2021-2022 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	201	CIVIL PROCEDURE I	5.00	5.00	P	
Instructor:		Sinnar, Shirin A				
LAW	205	CONTRACTS	5.00	5.00	P	
Instructor:		Kelman, Mark G				
LAW	219	LEGAL RESEARCH AND WRITING	2.00	2.00	H	
Instructor:		Mance, Anna				
LAW	223	TORTS	5.00	5.00	P	
Instructor:		Engstrom, Nora Freeman				
LAW	240U	DISCUSSION (1L): RACE, CIVIL RIGHTS, AND HUMAN RIGHTS	1.00	1.00	MP	
Instructor:		Martinez, Jennifer				

LAW TERM UNTS: 18.00 LAW CUM UNTS: 18.00

2021-2022 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	203	CONSTITUTIONAL LAW	3.00	3.00	P	
Instructor:		Martinez, Jennifer				
LAW	207	CRIMINAL LAW	4.00	4.00	P	
Instructor:		Weisberg, Robert				
LAW	224A	FEDERAL LITIGATION IN A GLOBAL CONTEXT: COURSEWORK	2.00	2.00	P	
Instructor:		Wall, Robin Michael				
LAW	3507	LAW AND THE RHETORICAL TRADITION	3.00	3.00	P	
Instructor:		Sassoubre, Ticien Marie				

LAW TERM UNTS: 12.00 LAW CUM UNTS: 30.00

2021-2022 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	217	PROPERTY	4.00	4.00	P	
Instructor:		Thompson Jr, Barton H				
LAW	224B	FEDERAL LITIGATION IN A GLOBAL CONTEXT: METHODS AND PRACTICE	2.00	2.00	H	
Instructor:		Wall, Robin Michael				
LAW	2402	EVIDENCE	4.00	4.00	P	
Instructor:		Sklansky, David A				
LAW	7111	LAWYERING FOR CHANGE: A CASE STUDY IN EFFORTS TO ABOLISH THE DEATH PENALTY	2.00	2.00	H	
Instructor:		Marshall, Lawrence				
Transcript Note:		John Hart Ely Prize for Outstanding Performance				
LAW	7833	SPANISH FOR LAWYERS	2.00	2.00	MP	
Instructor:		Calderon, Adriana L Sundaresan, Milan				

LAW TERM UNTS: 14.00 LAW CUM UNTS: 44.00

2022-2023 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	400	DIRECTED RESEARCH	2.00	2.00	H	
Instructor:		Sklansky, David A				
LAW	2002	CRIMINAL PROCEDURE: INVESTIGATION	4.00	4.00	H	
Instructor:		Weisberg, Robert				
LAW	2008	THREE STRIKES PROJECT: CRIMINAL JUSTICE REFORM & INDIVIDUAL REPRESENTATION	3.00	3.00	H	
Instructor:		Romano, Michael S				
LAW	7820	MOOT COURT	2.00	2.00	MP	
Instructor:		Fenner, Randee J Pearson, Lisa M				

Worksheet - For office use by authorized Stanford personnel Effective Autumn Quarter 2009-10, units earned in the Stanford Law School are quarter units. Units earned in the Stanford Law School prior to 2009-10 were semester units. Law Term and Law Cum totals are law course units earned Autumn Quarter 2009-10 and thereafter.

Leland Stanford Jr. University
School of Law
Stanford, CA 94305
USA

Law Unofficial Transcript

Name : Hoban,Alisa
Student ID : 06485059

LAW TERM UNTS: 11.00 LAW CUM UNTS: 55.00

2022-2023 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	902A	COMMUNITY LAW CLINIC: CLINICAL PRACTICE	4.00	4.00	P	
Instructor:		Brodie, Juliet M. Douglass, Lisa Susan Jones, Danielle				
LAW	902B	COMMUNITY LAW CLINIC: CLINICAL METHODS	4.00	4.00	H	
Instructor:		Brodie, Juliet M. Douglass, Lisa Susan Jones, Danielle				
LAW	902C	COMMUNITY LAW CLINIC: CLINICAL COURSEWORK	4.00	4.00	H	
Instructor:		Brodie, Juliet M. Douglass, Lisa Susan Jones, Danielle				
LAW	7820	MOOT COURT	1.00	1.00	MP	
Instructor:		Fenner, Randee J Pearson, Lisa M				

LAW TERM UNTS: 13.00 LAW CUM UNTS: 68.00

2022-2023 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	902	ADVANCED COMMUNITY LAW CLINIC	3.00	0.00		
Instructor:		Brodie, Juliet M. Douglass, Lisa Susan Jones, Danielle				
LAW	2001	CRIMINAL PROCEDURE: ADJUDICATION	4.00	0.00		
Instructor:		Weisberg, Robert				
LAW	7010B	CONSTITUTIONAL LAW: THE FOURTEENTH AMENDMENT	3.00	0.00		
Instructor:		Schacter, Jane				
LAW	7826	ORAL ARGUMENT WORKSHOP	2.00	0.00		
Instructor:		Fenner, Randee J				

LAW TERM UNTS: 0.00 LAW CUM UNTS: 68.00

END OF TRANSCRIPT

David Alan Sklansky
Stanley Morrison Professor of Law
Faculty Co-Director, Stanford Criminal Justice Center
559 Nathan Abbott Way
Stanford, California 94305-8610
650-497-6580
dsklansky@law.stanford.edu

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing in enthusiastic support of the application of my student, Alisa Hoban, Stanford Law JD24, to clerk for you. Alisa is a wonderful student, a spectacular human being, and a joy to be around. She has compiled an impressive academic record at Stanford while throwing herself into a dizzying array of extracurricular activities, leadership responsibilities, and pro bono work. She has a deep, passionate commitment to public service, but is not in the least headstrong or self-righteous. She knows what she thinks, and can argue for it cogently, but is soft-spoken, open-minded, and genuinely interested in learning from others. She is disciplined and diligent when working independently, but also enjoys—and is good at—collaboration. She is an accomplished writer and is good at taking and incorporating suggestions. She will be an exemplary law clerk.

I know Alisa well. She took my Evidence course in the spring of her first year of law school, and the following fall she wrote a paper under my supervision. She did fine in Evidence, but her work on the paper is what really impressed me. She took on a hard and important question: in how many cases, and what kinds of cases, have the new legislative restrictions on the felony murder rule in California made a difference? Answering the question took a combination of close doctrinal analysis, careful parsing of statutory language, and some diligent and creative empirical work, reaching out to and interviewing a range of prosecutors and defense attorneys. The final result was a very impressive paper, easily earning an honors grade.

Stanford Law School attracts many impressive students with strong commitments to public service, but Alisa is exceptional in this regard, even compared with her classmates. As an undergraduate at Brown—where she earned a bachelor's degree in political science and participated in the International Honors Program—she participated in a range of service activities targeting underprivileged youth, including as an algebra tutor, a childcare volunteer, a member of the Student Engagement Committee for Brown's Swearer Center for Public Service, and a co-director of Brown Refugee Youth Tutoring and Enrichment. She also spent a summer interning at the Refugee and Immigrant Center for Education and Legal Services. Between college and law school, Alisa worked as a paralegal at the Antitrust Division of the U.S. Department of Justice, while also volunteering at the Washington Legal Clinic for the Homeless and at an organization providing childcare at a shelter for survivors of domestic violence. Here at Stanford, Alisa has participated in the law school's Three Strikes Project and its Fresh Lifelines for Youth program, and she has helped to lead the Stanford Law Association, the Stanford Latinx Law Student Association, the Criminal Law Society, and the Women of Color Collective. In recognition of her truly extraordinary service, she received the Leon M. Cain Community Service Award following her first year of law school. Alisa spent the summer after her 1L year interning with the Federal Defenders Office in Brooklyn, and she will work during her 2L summer in the Juvenile Services Program at the Public Defender Service in Washington, D.C.

Alisa is a truly extraordinary student. She will be a wonderful law clerk. Please don't hesitate to let me know if I can answer any questions about her.

Sincerely,

/s/ David Alan Sklansky

StanfordLawSchool

JENNY S. MARTINEZ
Richard E. Lang Professor of Law and Dean

Crown Quadrangle
559 Nathan Abbott Way
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Tel 650 723-4455
Fax 650 723-4669
jmartinez@law.stanford.edu

Stanford Grading System

Dear Judge:

Since 2008, Stanford Law School has followed the non-numerical grading system set forth below. The system establishes "Pass" (P) as the default grade for typically strong work in which the student has mastered the subject, and "Honors" (H) as the grade for exceptional work. As explained further below, H grades were limited by a strict curve.

H	Honors	Exceptional work, significantly superior to the average performance at the school.
P	Pass	Representing successful mastery of the course material.
MP	Mandatory Pass	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
MPH	Mandatory Pass - Public Health Emergency*	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
R	Restricted Credit	Representing work that is unsatisfactory.
F	Fail	Representing work that does not show minimally adequate mastery of the material.
L	Pass	Student has passed the class. Exact grade yet to be reported.
I	Incomplete	
N	Continuing Course	
[blank]		Grading deadline has not yet passed. Grade has yet to be reported.
GNR	Grade Not Reported	Grading deadline has passed. Grade has yet to be reported.

In addition to Hs and Ps, we also award a limited number of class prizes to recognize truly extraordinary performance. These prizes are rare: No more than one prize can be awarded for every 15 students enrolled in a course. Outside of first-year required courses, awarding these prizes is at the discretion of the instructor.

* The coronavirus outbreak caused substantial disruptions to academic life beginning in mid-March 2020, during the Winter Quarter exam period. Due to these circumstances, SLS used a Mandatory Pass-Public Health Emergency/Restricted Credit/Fail grading scale for all exam classes held during Winter 2020 and all classes held during Spring 2020.

For non-exam classes held during Winter Quarter (e.g., policy practicums, clinics, and paper classes), students could elect to receive grades on the normal H/P/Restricted Credit/Fail scale or the Mandatory Pass-Public Health Emergency/Restricted Credit/Fail scale.

The five prizes, which will be noted on student transcripts, are:

- the Gerald Gunther Prize for first-year legal research and writing,
- the Gerald Gunther Prize for exam classes,
- the John Hart Ely Prize for paper classes,
- the Hilmer Oehlmann, Jr. Award for Federal Litigation or Federal Litigation in a Global Context, and
- the Judge Thelton E. Henderson Prize for clinical courses.

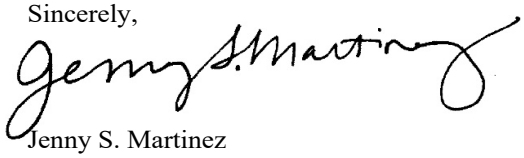
Unlike some of our peer schools, Stanford strictly limits the percentage of Hs that professors may award. Given these strict caps, in many years, *no student* graduates with all Hs, while only one or two students, at most, will compile an all-H record throughout just the first year of study. Furthermore, only 10 percent of students will compile a record of three-quarters Hs; compiling such a record, therefore, puts a student firmly within the top 10 percent of his or her law school class.

Some schools that have similar H/P grading systems do not impose limits on the number of Hs that can be awarded. At such schools, it is not uncommon for over 70 or 80 percent of a class to receive Hs, and many students graduate with all-H transcripts. This is not the case at Stanford Law. Accordingly, if you use grades as part of your hiring criteria, we strongly urge you to set standards specifically for Stanford Law School students.

If you have questions or would like further information about our grading system, please contact Professor Michelle Anderson, Chair of the Clerkship Committee, at (650) 498-1149 or manderson@law.stanford.edu. We appreciate your interest in our students, and we are eager to help you in any way we can.

Thank you for your consideration.

Sincerely,



Jenny S. Martinez
Richard E. Lang Professor of Law and Dean

Updated May 2020

Robert Weisberg
Edwin E. Huddleson, Jr. Professor of Law
Faculty Co-Director, Stanford Criminal Justice Center
Associate Dean for Curriculum
559 Nathan Abbott Way
Stanford, California 94305-8610
650-723-0612
weisberg@stanford.edu

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

With her great intellectual energy, her passion and commitment to constitutional values, her first-class legal reasoning and analytic skills, and her wonderful personality, Sara Alisa Hoban (she goes by Alisa), Stanford J.D. 2024, is among my favorite law students over many years. I know Alisa exceptionally well. She was in my section for first-year Criminal Law, a required course. She then chose to rule in both of my criminal procedure electives. In the fall of 2022, she was in the course in Criminal Investigation, the challenging adventure through Supreme Court doctrines on searches and seizures and interrogations. She then completed the spring elective in Criminal Adjudication, which covers a wide variety of topics ranging from right to counsel to ineffective assistance of counsel to plea bargaining to jury selection to double jeopardy and even a dash of federal habeas corpus. In all, Alisa has been a terrific student. In class discussions, she regularly offered very sharp and insightful responses. Indeed, she is happy to play the role of the perfect Socratic dialogue partner. In the first-year course, she really wrote an excellent exam, but under our extremely opaque grading system, she was a statistically insignificant point from the Honors range (her paper might have gotten an A-minus on our old system). Fortunately, she got over the hurdle by far in the Investigation course. (The spring exams haven't been graded yet, but I expect her to do at least as well in Adjudication.) And I'll be so bold as to say this is telling for the following reason: This is not a compliment to me, but I am notorious at Stanford Law School for giving very difficult, time-pressured, issue-spotter exams. True, a very strong student could have an unlucky bad day on my exams, but a merely fair student cannot have a lucky Honors level performance.

So, I believe that in combination with her other courses, Alisa has demonstrated absolutely top-notch talent along the dimensions you seek in your clerkship. Indeed, in that regard, I'm happy to note that she has scored Honors grades in two terms of our extremely rigorous Legal Research and Writing curriculum (the second term is called Federal Litigation). Those are real gauntlets that test the ability to do the kind of analytic writing you expect of your clerks.

But let me add some thoughts about Alisa's background. She's a Texan whose ancestry comes from migrant workers at the Rio Grande border. She has a very acute sense of social justice and injustice, and her civil rights idealism is deep and passionate, but Alisa is no ideologue. She is a very practical-minded young lawyer who does all the hard work of thinking through doctrinal arguments on both sides of whatever position she might favor. Notably, in her two years between college and law school, she both volunteered for a project providing legal aid to the homeless and worked full-time as a paralegal in the DOJ Antitrust Division.

I'm pleased to see that she is also highly regarded by some of my most distinguished colleagues. Professor Larry Marshall, one of the leading death penalty lawyers in the nation, has supervised her paper on the history of the abolition movement in the southern states. Another colleague, Professor David Sklansky, has supervised her research on changes in California's felony murder law—a topic that requires extremely detailed and nuanced statutory analysis. Alisa has also walked the walk in our famed Three Strikes Project, helping incarcerated clients navigate the intricacies of state habeas law by drafting petitions that benefit from new sentencing reduction laws. Meanwhile, she's been a wonderfully active civic leader here at Stanford, including, and here I'm being selfish, as a leader of the Criminal Law Society, the student group which works directly with the Stanford Criminal Justice Center, which I co-direct.

Finally, I want to note something that might get lost on her résumé. Alisa was selected by her classmates to be on the Academic Affairs Committee of the Stanford Law Association. One of the functions of that committee is to represent students as part of a small group that interviews candidates for faculty positions.

At Stanford, whenever we consider an entry-level assistant professor candidate or a lateral tenured professor candidate, in addition to our faculty interviewing process, the candidates always meet with this committee. And our Appointments Committee (and, if the case goes forward, the whole faculty) will rely significantly on the students' views on what kind of teacher and role model the candidate might be for students. So, Alisa's placement on that committee demonstrates the academic sophistication and judgment her classmates ascribe to her.

Finally, Alisa is an incredibly generous, warm, and collegial person. She'll bring these character traits and her great legal talent to your chambers. If I can supply further information about Alisa, please let me know. Indeed, feel free to call me at your convenience via my cell phone: (650) 888-2648.

Robert Weisberg - weisberg@law.stanford.edu

Sincerely,

/s/ Robert Weisberg

Robert Weisberg - weisberg@law.stanford.edu

Michael Romano
Lecturer in Law
559 Nathan Abbott Way
Stanford, California 94305-8610
650-723-8670
mromano@stanford.edu

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to enthusiastically recommend my former student Alisa Hoban as a law clerk in you chambers. She is a star and a pleasure to work with. I am confident she will make a terrific clerk, and you will congratulate yourself on hiring her.

In my dozen years teaching at Stanford, Alisa stands out as one of the most engaged, conscientious, and talented students I've had the pleasure of teaching.

In the fall of 2022, Alisa enrolled as a student in the Stanford Three Strikes Project, a program that combines experiential (clinic-style) learning with a classic seminar curriculum, which I teach. The Project's seminar component covers advanced criminal procedure, related constitutional doctrine, and post-conviction litigation strategies. As a student in the Project, Alisa was responsible for leading our litigation on behalf of a state prisoner sentenced to life under California's Three Strikes law for a nonviolent crime. As a result of the mixed-nature of the Project program, I was able to observe and supervise Alisa in both academic and professional settings.

Alisa led all aspects of our representation of a Project client sentenced to life for stealing a bag of groceries. The case was complicated and novel. It involved eligibility criteria for criminal justice reform measures recently enacted by the state legislature. The case is currently pending before the California Superior Court. Alisa did an outstanding job drafting our opening brief in the case, distilling the legal issues, unusual procedural posture, and standards of review. Any top-tier law firm would be proud of her work.

Alisa's writing is clear and concise. She does an excellent job combing through the record, finding relevant details, and linking those facts to helpful case law, statutes, and regulations. She also built excellent rapport with our client, who was unaccustomed to having visitors and unaware of his legal opportunities.

As part of the Project, we had weekly supervision meetings in addition to the Project seminar. Alisa was always well prepared and engaged. She takes feedback well and is a very hard worker. She is thoughtful, earnest, and intellectually curious and honest. She is able to work in fast-paced and high-stakes environments, analyzing large amounts of information and succinctly summarizing the merits. Alisa also works within time deadlines and produced well-edited and complete written work.

Alisa also has a broad range of experience and commitment to public interest legal work. She has worked for both the United States Department of Justice Antitrust Division and the Federal Defenders in New York City. She has also worked with people experiencing homelessness and refugees. At Stanford, she won the Leon Cain Community Service Award, which is awarded for strengthening the community through leadership and care; and the top grade and honor for Outstanding Performance in Lawyering for Change.

Finally, Alisa is a pleasure to work with, and it is my impression is that she is extremely well liked among other students at the law school. She engages deeply with her work and is eager to learn and work hard. She frequently delivers more than what is expected and happily takes on extra challenges.

In short, I believe Alisa will make an excellent attorney and law clerk. Please do not hesitate to contact me if you have any questions about Alisa or her application.

Sincerely,

/s/ Michael Romano

S. ALISA HOBAN
1645 Madrono Ave., Palo Alto, CA 94306 | (512) 653-1445 | alisah@stanford.edu

WRITING SAMPLE

The attached writing sample is a draft objection to a probation department's presentence investigation report. I prepared this draft objection as a legal intern for the Federal Defenders of New York in the Eastern District. As such, the legal research was primarily guided by the caselaw in the Eastern District of New York and Second Circuit precedent.

At the beginning of the assignment, I received guidance as to what kind of cases would be helpful and discussed the legal research to be performed with my attorney supervisors. I performed all of the legal research for the draft pre-sentence report objection and later received feedback and submitted additional drafts. Identifying information about my client, including references to discovery materials, has either been redacted or replaced with fictional names for confidentiality purposes. I am submitting the attached writing sample with the permission of the office of the Federal Defenders of New York in the Eastern District.

Background

The client was awaiting sentence, having pled guilty to Arson. In the context of the civil unrest that followed the murder of George Floyd in May 2020, she attended protests and threw a bottle, alleged to have been a Molotov cocktail, into a parked police vehicle. The van had several officers in the front seat. No officers were harmed, the device did not ignite, and the extent of the damage to the vehicle was minimal.

Offense Level Computation

Count 2:

PSR ¶ 21 The base offense level which appropriately reflects Ms. Doe's conduct is §2K1.4(a)(4). Ms. Doe's conduct did not result in a substantial risk of death or serious bodily injury to another person, so a base offense level of U.S.S.G. §2K1.4(a)(1) or §2K1.4(a)(2) is improper.

§2K1.4(a)(4) is the appropriate base offense level.

§2K1.4(a)(4) is the base level offense that most accurately reflects the reality of the property damage caused by Ms. Doe's conduct. This base level offense starts at 2 plus the offense level of 6 from §2B1.1 (Theft, Property Destruction, and Fraud) which leaves Ms. Doe with a base offense level of 8.

Ms. Doe did not create a substantial risk of death or serious bodily injury under USSG §2K1.4(a)(1) or §2K1.4(a)(2), knowingly or otherwise. Thus, a base level offense under USSG §2K1.4(a)(1) is improper.

A base level offense under USSG §2K1.4(a)(1) requires that the defendant "knowingly" created a serious risk of bodily injury or death. *See United States v. Ram*, 101 F.3d 107 (2d Cir. 1996) (noting that the Second Circuit has not determined what *level* of knowledge is required, but holding §2K1.4(a)(1) applied because the defendant had actual knowledge of a substantial risk since the fire took place on the ground floor of an occupied, residential building); *see also United States v. Marji*, 158 F.3d 60, 63–64 (2d Cir. 1998) (holding that the base level offense USSG §2K1.4(a)(1) applied after observing that the district court expressly found the defendant *knew* the apartments above the fire were occupied). Moreover, the base level offense of 2K1.4(a)(1) has not been applied in substantially similar cases. *See, e.g.*, *United States v. Tindal*, 21 CR 6038 (CJS) (applying base level offense of 2K1.4(a)(2)(A) after defendant plead guilty to 18 U.S.C. § 2101 (a) (Riot) for setting fire to a police patrol vehicle), Dkt. No. 29.

Ms. Doe's position has remained consistent throughout. Ms. Doe believed the police van she damaged was empty. In Ms. Doe's post-arrest statements, she repeatedly noted that "the vehicle appeared abandoned." PSR ¶ 11. Ms. Doe did not intend to hurt anyone. Plainly, Ms. Doe did not knowingly create a risk of

serious bodily injury, her sole goal in throwing the bottle was to express her anger as part of protests surrounding the murder of George Floyd. Although two of the van windows were shattered, no one inside the van was hurt.

Moreover, USSG §2K1.4(a)(1) or §2K1.4(a)(2) are not the appropriate base level offense because the offense did not create a substantial risk of death or serious bodily injury. The bottle that was thrown did not create an actual risk of injury as an incendiary device. The bottle did not contain a flammable or incendiary liquid; was not shown to be capable of igniting; and it did not shatter upon impact.

The Police and FBI's own reports stated that the bottle tested negative for the presence of an ignitable liquid; therefore, the bottle did not pose a risk as an incendiary device. The Evidence Collection Unit expressly noted that residue of the liquid in the bottle would allow for accurate testing to determine the presence of a flammable liquid. DOE_XXXX. When the FBI Explosive Chemistry Laboratory performed a "solvent extraction" followed by "analysis with gas chromatography/mass spectrometry" the conclusion formed was that "no ignitable liquid residues were identified on the inner surfaces of" the bottle. DOE_XXXX.

There was not a substantial risk of serious injury as a consequence of Ms. Doe throwing the glass bottle into the empty, backseat area of the van. While Ms. Doe admitted to throwing the bottle at the van, she explained that it was not on fire; corroborating her statement is the actual video that shows the bottle was not on fire when it was thrown and that no fire resulted when the bottle struck the van. *See* DOE_XXX IMG_XXX at XX:XX.

Ms. Doe's only ill intent was to make a statement of protest, not to harm or seriously injure anyone. Indeed, perhaps the best indicator of the fact that there was not a substantial risk of injury is that no one was actually injured by Ms. Doe's conduct.

PSR ¶ 23 Ms. Doe did not knowingly assault a law enforcement officer in a manner which created a substantial risk of serious bodily injury under U.S.S.G. § 3A1.2(c)(1). An enhancement under this section is improper for the following reasons:

Ms. Doe did not have the mens rea necessary for a §3A1.2(c)(1) enhancement.

Where, as here, a statute incorporates language with an accepted common-law definition, construction of the statute is guided by that accepted meaning. *See United States v. Shabani*, 513 U.S. 10, 13 (1994). The Second Circuit applies the common law definition of assault to § 3A1.2. *United States v. Young*, 910 F.3d 665, 672 (2d Cir. 2018). Importantly, the Second Circuit interprets common law assault as requiring specific intent. *See United States v. Delis*, 558 F.3d 177, 180 (2d Cir. 2009) ("[C]ommon-law assault consisted of either attempted battery or the deliberate infliction upon another of a reasonable fear of physical injury and is often described as a specific intent crime.")

While being interrogated by agents, Ms. Doe freely admitted that she could see the van was a marked NYPD vehicle. She is equally credible and consistent in explaining that she thought the van was empty and could not see anyone inside. Adamant in her belief, Ms. Doe reiterated this truth to officers at least twelve times throughout hours of interrogation. XXXX. at X:XX:XX-XX:XX:XX. The government has not proffered any evidence that indicates Ms. Doe knew there were police officers in the van or that she actually intended to harm anyone. Because Ms. Doe unequivocally believed that the police van was empty, she did not have the requisite mens rea of knowing or intending to cause serious bodily injury to a law enforcement official.

Moreover, although the PSR states that the conduct posed a substantial risk because "by igniting the van, she was creating a risk to any law enforcement officer responding to the burning van," PSR ¶ 15, the official victim enhancement has not been applied in similar cases in this Circuit, including cases where defendants successfully detonated incendiary devices causing extensive fire damage to police vehicles.

- In *United States v. Rahman* and *United States v. Mattis*, 20-cr-203 (E.D.N.Y.) (BMC), defendants threw a lit Molotov cocktail that destroyed an NYPD vehicle. No § 3A1.2(c)(1) enhancement was applied.

- In *United States v. Shawn Jenkins*, 20-cr-639 (S.D.N.Y.) (JPC), defendant yelled "ya might wanna get out of here, I'm gonna throw this at the police," and then proceeded to throw a lit Molotov cocktail at an NYPD vehicle, burning a vehicle belonging to an NYPD officer. No § 3A1.2(c)(1) enhancement was applied.

- In *United States v. Smith* and *United States v. Carberry*, 20-cr-544 (S.D.N.Y.) (LJL), defendants threw a lit Molotov cocktail at an NYPD van, setting it on fire. Several minutes later, as the flames subsided, they added accelerant, engulfing the police van and totally destroying it. No § 3A1.2(c)(1) enhancement was applied.

- In *United States v. Tindal*, 21-cr-6038 (W.D.N.Y.) (CJS), defendant completely destroyed a police vehicle using an aerosolized flame. No § 3A1.2(c)(1) enhancement was applied.

In this case, Ms. Doe did not know there were police officers in the van and did not intend to physically harm anyone. Such an intent is required for the §3A1.2(c)(1) enhancement to apply. Although the PSR states that "Ms. Doe knew or had reasonable cause to believe that her targets were law enforcement officers," PSR ¶ 14, reasonable cause is not the applicable standard. Ms. Doe did not intend to target anyone, let alone law enforcement officers. As the PSR states

elsewhere, "[I]t is unclear if Ms. Doe was aware that officers were present in the van when she lobbed the device." PSR ¶ 15.

Moreover, Ms. Doe does not qualify for the §3A1.2(c)(1) enhancement because she did not cause serious bodily injury to an officer, nor was there a substantial risk of such injury occurring.

A §3A1.2(c)(1) enhancement requires that there be a "substantial risk of serious bodily injury" to a police officer. Although, "serious bodily injury" need not actually have occurred, there must have been a "substantial risk" of serious injury. *See United States v. Ashley*, 141 F.3d 63, 68 (2d Cir. 1998). A serious bodily injury is defined under the sentencing guidelines as an "injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." U.S.S.G. § 1B1.1, Application Note (L). "The determination as to whether the defendant's conduct posed a 'substantial risk of serious bodily injury' within the meaning of § 3A1.2(b) requires an analysis of the risks to the officers in light of the court's findings as to the nature of the defendant's conduct and involves an application of the Guidelines to the facts." 141 F.3d at 69 (citing *United States v. Weaver*, 8 F.3d 1240, 1245).

Applying the Guidelines to the facts of Ms. Doe's conduct reveals that there was not a substantial risk of serious bodily injury to law enforcement. The PSR claims that Ms. Doe's conduct posed a substantial risk because "by igniting the van, she was creating a risk to any law enforcement officer responding to the burning van." PSR ¶ 15. However, the van never ignited, and there was no proof there was a risk it might ignite.

In order for the official victim enhancement to apply, a defendant must have intended to harm or cause risk of harm to a law enforcement official; Ms. Doe did neither. In order for §3A1.2(c)(1) to apply in this case, the court would have to find 1) that there was an actual risk of a fire occurring and 2) that Ms. Doe had the requisite intention for law enforcement to become seriously injured in the course of responding to a fire. There was not a risk of a fire occurring because the projectile that was thrown was inert. As previously addressed, Ms. Doe did not intend to harm anyone, nor did she have a long-term goal of creating a risk of injury in officers responding to the scene. There was no risk that a law enforcement official would become injured in responding to a burning van because the van was never on fire, nor was there proof of a substantial risk it would ignite.

Applicant Details

First Name	**Jonathan**
Last Name	**Hong**
Citizenship Status	**U. S. Citizen**
Email Address	**jsh162@georgetown.edu**
Address	**Address** Street **8516** City **Countrybrooke Way** State/Territory **Maryland** Zip **21093** Country **United States**
Contact Phone Number	**4102584096**

Applicant Education

BA/BS From	**Towson University**
Date of BA/BS	**May 2020**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 12, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Environmental Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Rogers, Brishen
br553@georgetown.edu
2023346078
Thompson, Robert
rbt5@georgetown.edu
Krishnakumar, Anita
anita.krishnakumar@georgetown.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Jonathan Hong
8516 Countrybrooke Way, Lutherville Timonium, MD
6/9/2023

Honorable Judge Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am writing to apply for a 2024-2025 clerkship with your chambers. I am a recent graduate at the Georgetown University Law Center where I was a Dean's List Recipient and was an executive editor of the Georgetown Environmental Law Review.

As an aspiring civil litigator with extensive research and writing experience, I believe I would make a strong addition to your chambers. During law school, I was able to obtain practical experience by helping draft an amicus brief relating to federal bankruptcy law. Out of term, I honed my research and writing skills by writing various memos for litigation partners on federal procedural issues. My experience as an executive editor on the Georgetown Environmental Law Review allowed me to engage in a leadership role while working with authors to improve their submissions.

My resume, unofficial transcript, and writing sample are submitted with this application. Georgetown has submitted my recommendations from Professor Anita Krishnakumar, Professor Brishen Rogers, and Professor Robert Thompson. I would welcome the opportunity to interview with you, and look forward to hearing from you soon.

Respectfully,

Jonathan Hong

Jonathan Hong

401 Massachusetts Ave Apt #715 Washington, DC 20001 • 410-258-4096 • jsh162@law.georgetown.edu

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER — **Washington, DC**
Juris Doctor — **August 2021- May 2023**
GPA: 3.78/4.0 Dean's List: Fall 2021-Spring 2022
Journal: Georgetown Environmental Law Review: Executive Editor
Activities: Asian Pacific American Law Students Association. Transfer Students Association.
Honors: Section 6 Graduation Commencement Speaker. Highest Grade: Mergers & Acquisitions.

UNIVERSITY OF CONNECTICUT SCHOOL OF LAW — **Hartford, CT**
First-year J.D. coursework completed — **August 2020- May 2021**
GPA: 3.645/4.00 (12/135/Top 9%)
Activities: Asian Pacific American Law Students Association: 1L Representative. Club Soccer.

TOWSON UNIVERSITY — **Towson, MD**
Bachelor of Science, Political Science and Communication Studies Minor: Business Administration — **May 2020**
Honors: Dean's List: Fall 2017, Spring 2018, Fall 2018, Spring 2019, Fall 2019, Spring 2020
Activities: Study Abroad: Corporate Communication in the UK. Pre-Law Society: Treasurer. Kappa Delta Rho: Fundraising Chair. Club Lacrosse. Tigers Toastmasters. Future Business Leaders of America: Social Media Coordinator.

EXPERIENCE

Bankruptcy Practicum — **Washington, DC**
Student Researcher — **January 2023- Present**
- Researched court cases regarding the use of the "Texas Two Step" and Bad Faith.
- Assisted preparing an amicus brief for future Supreme Court appellate litigation.
- Worked with students to draft memos relating to bankruptcy appellate litigation.

Dentons US LLP — **New York, NY**
Summer Associate — **June 2022- Aug 2023**
- Conducted research regarding preliminary procedural issues in high level complex litigation.
- Created signatory pages and provided assistance in closing transactions.
- Represented client in Pro-Bono representation through U-Adjustment Process.

Brenner, Saltzman, & Wallman — **New Haven, CT**
Summer Associate — **June 2021–Present**
- Conducted legal research on diverse legal matters involving divorce, employment, and housing disputes.
- Drafted motions to strike in response to complaints filed by plaintiffs.
- Assisted settlement conferences with opposing counsel.
- Researched and Conducted legal analysis involving complex corporate legal issues.

Georgetown Environmental Law Review — **Washington, DC**
Executive Editor — **August 2022- Present**
- Provided cite checks for student notes and author submissions in accordance with bluebook requirements.
- Communicated with authors regarding substantive line edits and structural changes.
- Researched relevant legal issues regarding the environment and securities regulation.

Office of the Public Defender — **Towson, MD**
Legal Intern — **January 2019 – June 2019**
- Conducted legal research and drafted office memoranda.
- Prepared and drafted legal documents for trial.
- Reviewed and outlined video and audio tapes.
- Attended court with trial attorneys to witness hearings, trials, and judgements.

Relevant Coursework

- Procedural Coursework: Federal Courts, Evidence, Criminal Procedure, Administrative Law, Legislation and Regulation, Statutory Interpretation
- Corporate Coursework: Corporations, Securities Regulation, Mergers & Acquisitions, Bankruptcy Law
- Labor and Employment Coursework: Employment Discrimination, Employment Law, Labor Law

University of Connecticut

Unofficial Transcript

Name: **Jonathan Hong**
Student ID: **2920553**

Print Date: 06/28/2021

End of Unofficial Transcript

Beginning of Law Record

Fall 2020 (**2020-08-31** - **2020-12-22**)
Program: Juris Doctor 3 Yr. Day
Plan: Three Year Day Division Major

Course		Description	Attempted Credits	Earned Credits	Grade	Grade Points
LAW	7500	Civil Procedure	4.00	4.00	B+	13.200
LAW	7505	Contracts	4.00	4.00	A-	14.800
LAW	7510	Criminal Law	3.00	3.00	A	12.000
LAW	7518	Lgl Practice: Rsrch & Writing	3.00	3.00	A	12.000
LAW	7530	Torts	3.00	3.00	A-	11.100

			Attempted	Earned	GPA Units	Points
Semester GPA	3.712	Semester Totals	17.00	17.00	17.00	63.100
Cumulative GPA	3.712	Cumulative Totals	17.00	17.00	17.00	63.100

Spring2021
Program: Juris Doctor 3 Yr. Day
Plan: Three Year Day Division Major

Course		Description	Attempted Credits	Earned Credits	Grade	Grade Points
LAW	7519	Lgl Practice: Negotiation	1.00	1.00	P	0.000
LAW	7520	Lgl Practice: Intrv,Cnsl & Adv	3.00	3.00	B+	9.900
LAW	7525	Property	4.00	4.00	B	12.000
LAW	7540	Constitutional Law, An Intro	4.00	4.00	A	16.000
LAW	7987	Legislation and Regulation	3.00	3.00	A	12.000

Class rank: 1st Quintile (12/135)

			Attempted	Earned	GPA Units	Points
Semester GPA	3.564	Semester Totals	15.00	15.00	14.00	49.900
Cumulative GPA	3.645	Cumulative Totals	32.00	32.00	31.00	113.000

Fall 2021 (**2021-08-30** - **2021-12-21**)
Program: Juris Doctor 3 Yr. Day
Plan: Three Year Day Division Major

Course		Description	Attempted Credits	Earned Credits	Grade	Grade Points
LAW	7554	Compliance: Legal Perspective	3.00	0.00		0.000
LAW	7650	Environmental Law	3.00	0.00		0.000
LAW	7661	Federal Income Tax	3.00	0.00		0.000
LAW	7806	Renewable Energy Law	3.00	0.00		0.000
LAW	7980	Unfair/Deceptive Trade Prac	3.00	0.00		0.000

			Attempted	Earned	GPA Units	Points
Semester GPA	0.000	Semester Totals	15.00	0.00	0.00	0.000
Cumulative GPA	3.645	Cumulative Totals	47.00	32.00	31.00	113.000

Law Career Totals

Cumulative GPA	3.645	Cumulative Totals	47.00	32.00	31.00	113.000

Record of: Jonathan S. Hong
GUID: 801271066

Course Level: Juris Doctor

Transfer Credit:
University of Connecticut
School Total: 31.00
Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	121	02	Corporations Robert Thompson	4.00	A	16.00	
LAWJ	146	08	Environmental Law Lisa Heinzerling	3.00	P	0.00	
LAWJ	150	05	Employment Discrimination Jamillah Williams	3.00	A-	11.01	
LAWJ	1526	05	The Law of Autonomous Vehicles Edward Walters	2.00	B+	6.66	
LAWJ	1617	08	Entrepreneurship: The Lifecycle of a Business David Fogel	2.00	A	8.00	

	EHrs	QHrs	QPts	GPA
Current	14.00	11.00	41.67	3.79
Cumulative	45.00	11.00	41.67	3.79

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	128	08	Criminal Procedure Abbe Lowell	2.00	B+	6.66	
LAWJ	1468	05	Business and Financial Basics for Lawyers Brian Sawers	2.00	P	0.00	
LAWJ	263	09	Employment Law Jamillah Williams	3.00	A	12.00	
LAWJ	361	08	Professional Responsibility Elaine Block	2.00	A	8.00	
LAWJ	396	05	Securities Regulation Donald Langevoort	4.00	A	16.00	

Dean's List 2021-2022

	EHrs	QHrs	QPts	GPA
Current	13.00	11.00	42.66	3.88
Annual	27.00	22.00	84.33	3.83
Cumulative	58.00	22.00	84.33	3.83

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	025	05	Administrative Law Anita Krishnakumar	3.00	A	12.00	
LAWJ	165	02	Evidence Michael Pardo	4.00	B+	13.32	
LAWJ	1782	05	Statutory Interpretation Theory Seminar Anita Krishnakumar	3.00	A-	11.01	
LAWJ	264	05	Labor Law: Union Organizing, Collective Bargaining, and Unfair Labor Practices Brishen Rogers	3.00	A	12.00	

----------Continued on Next Column----------

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	48.33	3.72
Cumulative	71.00	35.00	132.66	3.79

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	054	08	Bankruptcy Law	2.00	A-	7.34	
LAWJ	1316	05	Bankruptcy Advocacy	4.00	B+	13.32	
LAWJ	1447	08	Mediation Advocacy Seminar	2.00	A-	7.34	
LAWJ	178	05	Federal Courts and the Federal System	3.00	P	0.00	
LAWJ	434	08	Mergers and Acquisitions	3.00	A+	12.99	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	14.00	11.00	40.99	3.73
Annual	27.00	24.00	89.32	3.72
Cumulative	85.00	46.00	173.65	3.78

End of Juris Doctor Record

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Jonathan Hong strongly for a clerkship in your chambers. Jonathan took my Labor Law class in the Fall of 2021. Based on his performance in my classes and our meetings outside of class, I feel well-qualified to assess his abilities and promise as an attorney.

Jonathan's work in my class was outstanding. He was always well-prepared and made insightful contributions to class discussion. Whenever I called on him, he was able to quickly summarize the key doctrine, and to recognize and analyze the nuances in the caselaw. He could also recognize the broader implications of cases, analyzing how they would advance or limit broader employers' legitimate interests in efficient production, or broader social goals such as employee voice and equality. I was unsurprised to learn that his final exam was one of the best in the class, with very strong writing and legal analysis.

As I understand, Jonathan is planning to work at a major law firm after graduation, but later to transition to plaintiff-side work. He may specialize in labor and employment law. As you'll see, his performance in all his classes in that field has been excellent, as has his performance in corporate and securities law. He is hoping to clerk in order to further develop his research, writing, and analytical skills, and also to gain exposure to a broader variety of issue areas within the law.

Jonathan has also had a somewhat unusual educational path, which signals to me that he has taken his education and professional training very seriously. He went to college at Towson University, then attended the University of Connecticut Law School for his 1L year before transferring to Georgetown as a 2L. In my experience, students with similar educational backgrounds who thrive in law school often have a maturity beyond their years, and end up being among the strongest and most diligent attorneys.

Having gotten to know Jonathan outside of class, I can also say that he has strong interpersonal skills. He is quite easy to get along with, thoughtful, and trustworthy. I would not hesitate to recommend him highly to other legal employers, as I expect that those qualities, together with his analytical skills, will make him a very successful attorney and an excellent co-worker.

In short, I strongly recommend Jonathan for a clerkship in your chambers. I believe he would be outstanding in that role. If I can be of assistance in any other way, please do not hesitate to contact me.

Sincerely,

Brishen Rogers
Professor of Law

Brishen Rogers - br553@georgetown.edu - 2023346078

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to urge your consideration of Jonathan Hong as a clerk in your chambers. He was a student in my corporations class last fall and mergers in the spring. They were large classes (about 115 in the fall and 70 in the spring). In the merger class his exam was one of two that separated themselves from the A group by a large margin resulting in an A+ grade for the course. In the corporations class, the exam was also well done and very complete, earning an A which put it in the top group of papers outside of the top 1%.

I would add two more things if it might be helpful. I had not initially picked him out in class as someone whose performance might be distinctive. It was at the end of the semester in a couple of office hour sessions where a half dozen students had shown up at the same time for what became a longer discussion that required putting together multiple points from the course. I made a mental note that he got it better than the rest. The second observation is that because I teach a large bar course in the fall semester of students' second year, I tend to get a noticeable number of transfer students, mixed in with those who have been together for first year. That can be an intimidating environment for the outsider that dampens learning and participation. I think he adapted very well in that setting. I encourage you to review his resume and references and to talk to him if you think there might be a fit.

Sincerely,

Robert B. Thompson
Peter P. Weidenbruch Jr. Professor of Law

Robert Thompson - rbt5@georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It gives me great pleasure to recommend Jonathan Hong, who has applied to serve as a law clerk in your chambers. Jonathan is bright, reliable, and very thoughtful—an excellent student and person. I believe he would make a great law clerk.

I got to know Jonathan during the 2022-2023 academic year, when he was a student in my Statutory Interpretation Theory seminar and in my Administrative Law class. The seminar had only 22 students and involved a lot of in-class discussion, so I got to know the students quite well. During that class, I spoke regularly with Jonathan in class and supervised a paper he wrote about a proposed SEC rule that would regulate greenhouse gases. In class, Jonathan was a solid contributor who could be counted on to chime in regularly and add value. He was always well-prepared and refreshingly honest in his responses. The paper Jonathan wrote, *An Interpretive Approach to Regulating Greenhouse Emissions through the Securities Laws*, analyzes the SEC's proposed rule and the likelihood that it would be upheld by courts. In the end, it concludes that there are strong textualist and purposivist arguments that the SEC does not have the authority to adopt the proposed rule. It is a very solid, well-researched and analytic paper that provides a deep-dive into an interesting and complicated topic.

Jonathan also was in my large Administrative Law class (100 students) and was well-prepared in that class as well, although I did not get to speak with him as deeply or regularly in that class. In both classes, Jonathan was a strong student who could be counted on to engage with the material and offer meaningful insights.

Beyond his excellence in the classroom, Jonathan is a valued member of the Georgetown Law community. He served as the Executive Editor of the *Georgetown Environmental Law Review*—a time-consuming job—and was active in the Asian Pacific American Law Students Association and the Transfer Students Association.

In short, I believe that Jonathan would make a strong law clerk—he is smart, hard-working, and responsible.

Thank you for considering this recommendation, and please let me know if I can provide any additional information about Jonathan that would assist you.

Sincerely,

Anita S. Krishnakumar
Professor of Law and
Anne Fleming Research Professor
anita.krishnakumar@georgetown.edu
(917) 592-4561

Eamon Bousa, Jonathan Hong, and Silas La Borde
3/22/2023

Writing Sample Description

The following writing sample is an Amicus Brief Draft Section written during my Bankruptcy Advocacy Practicum. The brief is my own work and has not been edited by any professors or students. The factual predicate of the brief is on J&J's recent bankruptcy litigation relating to Talc liabilities. The assignment required independent legal research with minimal feedback.

Eamon Bousa, Jonathan Hong, and Silas La Borde
3/22/2023

I. THE FAILURE TO PUT JJCI INTO BANKRUPTCY SUBVERTS MULTIPLE CODE PROVISIONS AND ALLOWS IT TO BENEFIT FROM THE SAFE HAVEN ASPECTS OF THE BANKRUPTCY CODE WITHOUT PROPERLY FILING.

A. JJCI violated 11 U.S.C. § 541 by not submitting its assets to the bankruptcy estate.

JJCI's use of the TBOC is not compatible with § 541 which requires all interests of the debtor to be placed into the bankruptcy process through the bankruptcy "estate." § 541 explicitly defines the estate as comprising "[a]ll interests of the debtor . . . as of the commencement of the case." Here, JJCI did not submit its assets to the bankruptcy court's jurisdiction. Instead, the bad faith filing subjected Old JJCI's talc liabilities to bankruptcy while excluding access to JJCI's operational assets. Therefore, JJCI's use of LTL allowed it to subvert the Code's requirements under § 541. This filing directly conflicts with § 541 by enabling Old JJCI to avoid submitting all of its interests to the bankruptcy court's jurisdiction.

JJCI is impermissibly benefiting from mandatory bankruptcy consolidation of talc claimants without submitting all their assets to the bankruptcy court's jurisdiction.[1] This use of the Code violates the "basic bankruptcy bargain" of full disclosure of one's financial situation for a discharge of nearly all debts. By refusing to submit its assets to the bankruptcy court's jurisdiction, JJCI is just one example of a "bankruptcy grifter"–an organization that receives the substantive benefits of bankruptcy but takes on a mere fraction of the burdens. Lindsey D. Simon, *Bankruptcy Grifters*, 131 Yale L.J. 1157 (2022). Permitting JJCI's use of

[1] Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 Yale L.J. Forum 960, 995 (2022).

the TBOC would encourage lawlessness under the Code and a consequent diminution of the "basic bankruptcy bargain."

JJCI is impermissibly utilizing the TBOC in order to escape liability from talc claims. JJCI has violated 11 U.S.C. § 502 by placing talc claims against JJCI into bankruptcy through LTL. Pursuant to § 502, the bankruptcy estate is limited to property of and claims against the debtor.[2] In this filing, since LTL is the debtor, J&J is a third-party non-debtor entity. Here, LTL is intentionally adding legal claims to bankruptcy that lie against non-debtor JJCI. This practice permits JJCI to avoid legal liability to claimants who have lost the opportunity to recover directly from JJCI. *Id.* JJCI's use of the TBOC restricts claimants from recovering from responsible parties without subjecting themselves to the necessary disclosure and oversight requirements under the Code. This utilization of the TBOC is fundamentally incompatible with the basic bankruptcy bargain and wrongfully diminishes creditor's rights without adequate protection.

B. JJCI's failure to file impermissibly allows it to avoid the mandatory financial disclosures required by 11 U.S.C. § 521.

By filing LTL for bankruptcy, JJCI avoided providing disclosures that would have helped creditors make informed decisions about the reorganization plan. The Bankruptcy Code imposes strict obligations on debtors to file complete and accurate financial disclosures. *Matter of Bayless*, 78 B.R. 506, 509 (Bankr. S.D. Ohio 1987). Under 11 U.S.C. § 521, debtors are required to provide a schedule of their assets and liabilities, statement of the debtor's financial affairs, and a schedule of their current income and expenditures. By

[2] *Abusing Chapter 11: Corporate Efforts to Side-Step Accountability Through Bankruptcy" Before the Senate Committee on the Judiciary, Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights*, (Written Testimony of Hon. Judith Klaswick Fitzgerald (Ret.) 1, 10.

providing these statements, creditors are given access to pertinent information and allowed to adequately examine the debtor. JJCI was able to completely bypass this process by filing a "surrogate" debtor (LTL) with no legitimate assets, business operations, or employees. Permitting this practice conflicts with the Code's fundamental disclosure policies.

JJCI's use of the TBOC, allows them to avoid necessary public accountability which encourages future tortious conduct. § 521 imposes strict obligations on the debtor to provide creditors with complete and accurate information. Judge Fitzgerald accurately states that failing to file JJCI "affords an escape from accountability by the entities who are responsible for the harms caused and able to pay for them." If JJCI were to file for bankruptcy, § 521 would require providing the public with substantive financial information. Instead, JJCI is able to avoid this by subjecting LTL to bankruptcy. By avoiding filing, JJCI is escaping public scrutiny by not disclosing information about their tort claims and business operations. This allows JJCI to avoid the price of reputational injury that normally accompanies a bankruptcy filing. JJCI should not be permitted to avoid liability and accountability through its bad faith utilization of the TBOC.

JJCI is impermissibly avoiding compliance with periodic reporting obligations under 11 U.S.C. § 1106. JJCI's use of the TBOC is incompatible with complying with their duties as debtors in possession under § 1106. 11 U.S.C. § 1107 requires debtors in possession to have the same duties as trustees per § 1106. Therefore, § 1106 requires debtors to furnish information concerning the estate and to provide periodic reports of their business operations in accordance with 11 U.S.C. § 704. This provision establishes a duty on the debtor to provide creditors with information on request. The duty enhances creditors' ability to examine the debtor and obtain information to assist them in making informed decisions. Once again, JJCI is avoiding complying with future disclosures by filing LTL into bankruptcy. JJCI is intentionally utilizing the TBOC in order to avoid their otherwise statutorily mandated

duties under the code. This practice is inconsistent with the duties of debtors under § 1106 and cannot be permitted by this court.

C. JJCI is impermissibly avoiding its obligations to provide creditors the opportunity to orally examine the debtor under 11 U.S.C. § 341.

By filing LTL for bankruptcy, JJCI was not required to attend a § 341 meeting and therefore, subverted creditor's ability to question the debtor about its financial affairs. 11 U.S.C. § 343 requires the debtor to attend a § 341 meeting that provides creditors the opportunity to examine the debtor. § 341 mandates a meeting of creditors which permits the Trustee and creditors an opportunity to question the debtor and obtain information about the bankruptcy. This provision guarantees an opportunity for creditors to ask the debtors questions on the record. Simon, *Bankruptcy Grifters*, *supra*, at 1209. JJCI has impermissibly bypassed this meeting requirement by filing LTL for bankruptcy. In doing so, creditors have been stripped of an opportunity to examine JJCI and ask questions about its financial affairs and liabilities. The ability to bypass a § 341 meeting provides a perverse incentive for debtors to utilize the TBOC to avoid providing disclosures or an opportunity to examine the affairs of the debtor. This practice is incompatible with the "basic bankruptcy bargain" as it inequitably prohibits creditors from adequately examining the debtor.

Allowing JJCI to avoid their § 341 meeting directly conflicts with the purposes of § 341– to provide creditors the opportunity to examine the debtor concerning its assets and financial affairs. 11 U.S.C. § 343. Specifically, the examination can lead to the recovery of assets for the estate, grounds to challenge the discharge of the debtor, and other relevant information to the administration of the bankruptcy estate. *In re Ladner*, 156 B.R. 664, 665 (Bankr. D. Colo. 1993). Attending the meeting is one of the most important responsibilities

for debtors in order for debtors to obtain the benefits of discharge. *Id*. The meeting is considered so important that many courts have held that the debtor's presence is mandatory with no exceptions. *In re Chandler*, 66 B.R. 334, 335 (N.D. Ga. 1986).

In practice, the § 341 meeting can provide information that leads to a denial of discharge based on inadequate disclosures. *In Re Corona*, No. 08-15924 (DHS), 2010 WL 1382122. 1, 11 (D.N.J. Apr. 5, 2010). In *Corona*, the court found that the debtor acted with reckless indifference to the truth of their initial financial disclosures and the statements they made during the § 341 meeting. JJCI's use of the TBOC allows the avoidance of the statutory check provided under § 341. This outcome gives debtors the ability to provide inadequate financial disclosures while leaving creditors without the opportunity to examine their affairs. Such a result is incompatible with the "basic bankruptcy bargain" which requires full disclosure in exchange for the benefits of discharge.

D. JJCI's failure to file avoids compliance with 11 U.S.C. § 363 because creditors are stripped of an opportunity for notice and hearing for non-ordinary course transactions.

JJCI's filing is impermissible because it enables them to conduct non-ordinary course transactions without obtaining advance court approval or providing creditors with an opportunity for notice and hearing. Under § 363(b)(1), non-ordinary course transactions require advance court approval and the opportunity for notice and hearing. § 363(b)(1) is meant to ensure that the full value of the business is available to creditors' claims. § 363(b)(1) ensures this by providing creditors an opportunity for notice and hearing regarding non-ordinary course transactions. By having LTL file, JJCI is free from their statutory obligations to provide creditors with an opportunity for notice and hearing before they

conduct non-ordinary course transactions. Court approval is required in order to provide scrutiny from creditors to ensure that they receive full value from debtor entities. Brubaker, *Legitimacy*, *supra*, at 5. As a result, JJCI is bypassing § 363 requirements as creditors will be unable to scrutinize the transactions without notice and a hearing. This outcome directly subverts creditor's rights while permitting the debtor to avoid ensuring that the full value of the business is available to claims. Permitting this outcome would promote lawlessness under the Code, as JJCI would be rewarded for avoiding Code requirements that make up the "basic bankruptcy bargain."

Courts have construed the purpose of § 363 to permit businesses to continue operation while protecting creditors from the dissipation of the estate's assets. *In re Dant & Russell, Inc.*, 67 B.R. 360, 363 (D. Or. 1986) (*citing* H.R. Rep. No. 595, 95th Cong., 1st Sess. 181-82 (1977). The underlying purpose of § 363 would be frustrated if debtors were permitted to avoid notice and hearing through their use of the TBOC. Specifically, debtors could use this loophole to avoid scrutiny for non-ordinary course transactions that shield their assets from creditors. The Supreme Court has held that "the debtor, though left in possession . . . does not operate [the business], as it did before the filing of the petition, unfettered and without restraint." *Case v. Los Angeles Lumber Prod. Co.*, 308 U.S. 106, 125 (1939). Allowing JJCI's use of the TBOC unjustly allows JJCI to operate unfettered and without restraint and is thereby incompatible with the Code's fundamental policy of oversight.

Applicant Details

First Name	**Sophia**
Middle Initial	**H**
Last Name	**Houdaigui**
Citizenship Status	**U. S. Citizen**
Email Address	**shoudaigui@uchicago.edu**
Address	**Address** Street **5454 S Shore Drive** City **Chicago** State/Territory **Illinois** Zip **60615** Country **United States**
Contact Phone Number	**2023526832**

Applicant Education

BA/BS From	**Barnard College**
Date of BA/BS	**April 2021**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Chicago Legal Forum**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just the Beginning Organization**

Recommenders

Ginsburg, Thomas
tginsburg@uchicago.edu
773-834-3087
Huq, Aziz
huq@uchicago.edu
773-702-9566
Levmore, Saul
s-levmore@uchicago.edu
773-702-9494

This applicant has certified that all data entered in this profile and any application documents are true and correct.

5454 S Shore Drive Apt. 1313
Chicago, IL, 60615
202-352-6832
shoudaigui@uchicago.edu

June 8, 2023

The Honorable Jamar K. Walker
United States District Court of the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510-1915 United States

Dear Judge Walker,

I am a rising third-year law student at the University of Chicago Law School, and I am applying for a clerkship in your chambers for the 2024-2025 term. Your career, particularly your time with the United States Attorney's Office for the Eastern District of Virginia, is inspiring as a young woman interested in pursuing a career in government service. My strong commitment to public service stems from my father's immigration story from Morocco to the United States. This personal drive coupled with my interest in public policy drove me to co-found Hyphenated America, a civic education platform aimed at making immigration laws and policies easier to understand for high school and college age students across the country.

Beyond my admiration for your career, my interest in clerking for the Eastern District of Virginia is deeply personal. As a Northern Virginia native, I care deeply about the Commonwealth. This passion for the state led me to write my senior thesis on Moroccan immigrant enclaves in Virginia. I conducted extensive research and published an opinion piece through the College concerning the inclusion of Middle Eastern and North African immigrants in politics throughout the South. I see a clerkship with you as an unrivaled opportunity to serve the people of the Commonwealth and learn from a committed public servant.

My professional, academic, and extracurricular experiences have prepared me well for a clerkship with your chambers. As a summer associate in Sidley Austin's New York office, I have already had the opportunity to work on various pro bono projects dedicated to criminal defense work, including advocacy of a Bronx native accused of conspiracy to distribute a controlled substance. Last summer, while interning in the Department of Justice's Office of Legal Policy, I analyzed and synthesized data to brief the Assistant Attorney General on voting rights and firearms issues. Interning in the House of Representatives and Senate for members on both sides of the political aisle had already solidified my interest in pursuing a long-term career in public service. These experiences would assist me in effectively considering multiple perspectives when reviewing briefs.

Furthermore, I want to leverage my leadership experience as your law clerk. As Managing Editor of the *University of Chicago Legal Forum*, I honed my editorial skills in the production of leading legal scholars' upcoming articles. My student comment, which centers on the domestic terrorism framework, allowed me to engage with substantive research. Additionally, this past year, I served as the Co-President of the University of Chicago's American Constitution Society chapter, the law school's largest student organization, serving over two hundred and fifty active members. Moreover, I have honed my public speaking skills by addressing international audiences, emphasizing the significance of politically empowering young women.

Please find my resume, writing sample, and law school transcript enclosed. Letters of recommendation from Professors Saul Levmore, Aziz Huq, and Tom Ginsburg will arrive under separate cover. Thank you for your consideration.

Sincerely,
/s/ Sophia Houdaigui
Sophia Houdaigui

Sophia Houdaigui
5454 S. Shore Drive, Chicago, Illinois 60615 | (202) 352-6832 | shoudaigui@uchicago.edu

EDUCATION

The University of Chicago Law School, Chicago, IL
Juris Doctor, Expected June 2024

- **Honors and Awards:** Recipient of the Anna Weiss Graff Honor Scholarship
- **Activities:** *University of Chicago Legal Forum*, Managing Editor; American Constitution Society, Co-President; Immigrants' Rights Clinic, Student Attorney; Southwest Asian and North Afrikan Law Students Association, Vice President; Law School Musical, Director; Faculty Interview Committee, Student Interviewer; Peer Advisor

Barnard College, Columbia University, New York, NY
Bachelor of Arts in History, April 2021

- **Honors and Awards:** Williams Fellow for Women in Politics, Highest Distinction in Leadership Award
- **Thesis**: *Maghribiin and the Commonwealth: The Moroccan Immigrant Experience in the American South*
- **Activities:** Columbia Political Review, Athena Center Advisory Board, Columbia Musical Theatre Society, Varsity Show

PROFESSIONAL EXPERIENCE AND EMPLOYMENT

Sidley Austin LLP, New York, NY
Summer Associate, May 2023-Present

- Conduct research for clients on a variety of matters including white collar litigation and criminal defense

Department of Justice, Office of Legal Policy, Washington, DC
Intern, May 2022 – August 2022

- Briefed the Assistant Attorney General and prepared memoranda on issues related to national security and firearms
- Coordinated the vetting of candidates for federal judgeships and assisted in the confirmation process with the White House

Hyphenated America, Washington, DC
Co-Founder, April 2020 – January 2022

- Created and managed a civic education platform dedicated to making immigration laws and policies easier to understand
- Featured on *Al Jazeera*; published opinion piece concerning immigration education in *The Chicago Tribune*

Columbia Justice Lab, New York, NY
Research Assistant, April 2021 – August 2021

- Spearheaded a report on the relationship between youth decarceration and regional crime rates

Congressman Will Hurd of Texas-23, Washington DC
Congressional Intern, May 2019 – August 2019

- Researched and wrote memoranda concerning international affairs, national security, and immigration
- Drafted opinion pieces for Rep. Hurd published in *The Wall Street Journal*, *The Washington Post*, and *USA Today*

Guidepost Solutions, Washington, DC
Intern, May 2018 – July 2018

- Performed research for clients concerning issues related to immigration and cryptocurrency, while monitoring use of their proprietary identity SecureID program utilized by private companies

Senator Tim Kaine, Washington, DC
Congressional Intern, April 2017 – June 2017

- Conducted legislative research; assisted staff with drafting memoranda; performed administrative tasks

Brooklyn Bagel Bakery, Arlington, VA
Cashier, Barista, and Social Media Coordinator, June 2015 – August 2021

- Managed opening and closing of registers, customer service, and maintenance of all social media content

COMMUNITY INVOLVEMENT

Running Start, Washington, DC
Ambassador and Independent Speaker, May 2015 – Present

- Elected as Ambassador in a national competition for Running Start, a nonprofit that trains young women to run for office
- Introduced a consortium before the UN; spoke alongside Senator Daschle; wrote for POLITICO's #WomenRule Newsletter

INTERESTS

- Musical theatre, comedy, reading political autobiographies, conversational Moroccan Arabic, conversational French

THE UNIVERSITY OF CHICAGO

Name: Sophia Hannah Houdaigui
Student ID: 12334998

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Current Status: Active in Program
J.D. in Law

External Education

Barnard College-Columbia University
New York, New York
Bachelor of Arts 2021

Beginning of Law School Record

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law Lior Strahilevitz	3	3	173
LAWS	30211	Civil Procedure Emily Buss	4	4	175
LAWS	30611	Torts Saul Levmore	4	4	176
LAWS	30711	Legal Research and Writing Michael Morse	1	1	178

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law Sonja Starr	4	4	173
LAWS	30411	Property Lee Fennell	4	4	173
LAWS	30511	Contracts Eric Posner	4	4	176
LAWS	30711	Legal Research and Writing Michael Morse	1	1	178

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Michael Morse	2	2	178
LAWS	30713	Transactional Lawyering Douglas Baird	3	3	173
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process Aziz Huq	3	3	176
LAWS	43201	Comparative Legal Institutions Thomas Ginsburg	3	3	179
LAWS	44201	Legislation and Statutory Interpretation Ryan Doerfler	3	3	177

Summer 2022

Honors/Awards
The University of Chicago Legal Forum, Staff Member 2022-23

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	42301	Business Organizations Anthony Casey	3	3	175
LAWS	46101	Administrative Law Thomas Ginsburg	3	3	178
LAWS	53219	Counterintelligence and Covert Action - Legal and Policy Issues Stephen Cowen Tony Garcia	3	3	178
LAWS	90211	Immigrants' Rights Clinic Amber Hallett	2	0	
LAWS	94120	The University of Chicago Legal Forum Anthony Casey	1	1	P

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	40201	Constitutional Law II: Freedom of Speech Genevieve Lakier	3	3	175
LAWS	43282	Energy Law Joshua C. Macey	3	3	177
LAWS Req Designation:	53221	Current Issues in Criminal and National Security Law Meets Writing Project Requirement Michael Scudder	3	3	179
LAWS	90211	Immigrants' Rights Clinic Amber Hallett	2	0	
LAWS	94120	The University of Chicago Legal Forum Anthony Casey	1	1	P

Date Issued: 06/03/2023

THE UNIVERSITY OF CHICAGO

Name: Sophia Hannah Houdaigui
Student ID: 12334998

University of Chicago Law School

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	41601	Evidence John Rappaport	3	3	176
LAWS	43218	Public Choice and Law Saul Levmore	3	3	177
LAWS	53456	Comparative Race, Ethnicity and Constitutional Design Thomas Ginsburg	3	0	
LAWS	90211	Immigrants' Rights Clinic Amber Hallett	2	0	
LAWS	94120	The University of Chicago Legal Forum Anthony Casey	1	1	P

End of University of Chicago Law School

Date Issued: 06/03/2023


THE UNIVERSITY OF
CHICAGO

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my pleasure to recommend Sophia Houdaigui, a member of the class of 2024, for a clerkship in your chambers. Sophia is a very strong candidate. She is a very bright and engaging person, a strong lawyer and good writer, and I recommend her very highly.

I first met Sophia during the Spring Quarter of her 1L year when she enrolled in my elective course in Comparative Legal Institutions. This course is designed to encourage thinking about law from a broad interdisciplinary perspective. In particular, it looks at law across time and space, integrating literatures from political science and economics along with more conventional legal materials. We survey, among other legal systems, those of imperial China and classical Islam, focusing on judicial institutions and their core structures. Sophia was an enthusiastic class participant who always added value to the class discussion, and demonstrated the ability to think creatively in dealing with novel material. She wrote one of the stronger exams in the class, finishing in roughly the top quintile.

In the Fall of 2022, Sophia enrolled as a student in my course in Administrative Law, which is of course a field in significant flux. She was an excellent addition to the class, reflecting her abiding interest in public service. She was an engaged and constructive participant in classroom discussions, whose interventions were always helpful in moving the class forward. She demonstrated a deep understanding of the material, and her serious commitment made the class much better. Sophia's exam was above the median in the class of 60 students, which as a group was among the best I have ever taught.

This last quarter, she was in a seminar I taught on Comparative Race, Ethnicity and Constitutional Design. We were looking at alternative models of racial difference in different societies, with each student focusing on a particular country. Sophia chose Morocco, where her father was born as a member of the minority Berber community. She was just a wonderful participant in the class, and navigated sensitive material with delicacy and skill. Her paper is due at the end of the Summer Quarter so I do not yet have a grade for her, but she is a fine writer and I expect her to do well.

I have also worked with Sophia as a staff person on the Legal Forum, in my capacity as advisor to the journals. She is a beloved member of the community who gets along with others. I have also worked with her in her role with the American Constitution Society. There, she helped organize a joint event with the Federalist Society on the Ukraine invasion, in which I was a participant. She embodies the willingness to engage in dialogue across difference, which we value so much here at Chicago. For Sophia, this engagement is the core of who she is: able to hold multiple perspectives at once and eager to discuss them.

Sophia is committed to public service, particularly focusing on immigration law at this point. She has the background in administrative law needed to navigate this area, and I am sure will have a wonderful career. You will also find Sophia to be an excellent person to mentor and to work with. She will soak up ideas, and turn around assignments quickly and with great skill. She will get along with everyone in chambers.

The bottom line is that Sophia Houdaigui is simply an excellent law student, who will be a smart, hardworking, and focused clerk, as well as a superb leader thereafter. I recommend her very highly and urge you to interview her. You will not be disappointed.

Please do not hesitate to contact me for further information or detail.

Sincerely,

Tom Ginsburg

Thomas Ginsburg - tginsburg@uchicago.edu - 773-834-3087

Aziz Huq
Frank and Bernice J. Greenberg Professor of Law
University of Chicago Law School
1111 East 60th Street | Chicago, Illinois 60637
phone 773-702-9566 | fax 773-702-0730
email huq@uchicago.edu
www.law.uchicago.edu

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Sophia Houdaigui (University of Chicago Class of 2024), to the position of law clerk in your chambers. I know Sophia because I taught her in a 1L elective classon Constitutional Law: Equal Protection and Due Process, and because I have worked with her in her capacity as co-president of the University of Chicago chapter of the American Constitution Society (ACS). Sophia has an extensive background in public service, having worked with a number of elected representatives, and has put together a solid record at the law school: This earned her a place on the University of Chicago Legal Forum, where she gone on to play a leadership role as a managing editor. My own experience working with her on ACS matters suggests to me that she is diligent, thorough, and very professionally capable. She will make a terrific law clerk. And I enthusiastically support her application.

Let me start with academics. As noted above, I taught Sophia in a 1L elective called Constitutional Law: Equal Protection and Due Process. The class (as I teach it) involves a great deal of constitutional and political history; it focuses on the way in which different moments in history have shaped the selection of controversies and the nature of the rules that emerge. Sophia was an active and consistently insightful contributor to the class. She wrote a very respectable exam and obtained a grade that was securely in the middle of the class's distribution. I write complex, issue-intensive exams that demand an ability to read a detailed fact pattern and immediately perceive not just the presence of a legal issue, but also a host of interactions between the legal issue and the facts, and also the several alternative (often outcome dispositive) ways of framing the issue. I identify ex ante 200 distinct points and subpoints that could be raised based on the exam prompts, and then grade students accordingly. This approach means I obtain a dispersion of grades that ensures meaningful distinction. Sophia's exam was well-written and showed a grasp of the relevant law. It did not evince any lack of legal skill, or cause for concern about her legal abilities.

More generally, Sophia was offered a very solid performance across her time so far at the law school. She has obtained good grades in a range of courses ranging from Legal Research and Writing, Administrative Law, and Comparative Legal Institutions. (Where she has fallen short has been in courses that are less law-focused, such as Transactional Lawyering: This mandatory class is very much aimed at students aiming to go into some form of business law, which I understand not to be Sophia's interest or focus. Her pattern of grades supports the conclusion that she would be a strong law clerk, fully equipped to address any of the issues that would come up in a federal chambers.

A little more context is useful to evaluate Sophia's grades, particular in relation to the grades and transcripts of students from peer schools. Unlike those peers, Chicago abjures grade inflation in favor of a very strict curve round a median score of 177 (which is a B in our argot), which is where Sophia's later scores cluster. But there is not large movement from this median and cannot be. Because Chicago grades on a normal distribution, and because it is on the quarter system, it is possible to be very precise about where a student falls in a class as a whole. This is simply not possible with a grading system of the kind used by some of our peer schools. These are seemingly designed to render ambiguous differences between the second tier of students and the third- and fourth-tiers. Students who are in fact Sophia's equals at other institutions are thus hard to distinguish from lower and higher performing students; they can hide variation in their performance, by their transcripts. This is an unfortunate effect of Chicago's effort at clarity and transparency, which tends to disadvantage (comparatively) students such as Sophia.

Beyond her academic work, Sophia has been an active member of the law school community, contributing in many different ways. In particular, she has been an absolute terrific co-president of the school's ACS chapter—indeed, so good that she and her colleague won an award from the national organization for their organizational skills, excitement, and vigor. From my perspective, the award seems more than warranted. Sophia has consistently demonstrated deep organizational capacity, a clear vision, and a deft hand in presenting often-difficult issues for a wide student audience. In addition, Sophia has taken on the labor-intensive and rather thankless role of managing editor at the University of Chicago Legal Forum. Further, she will be putting on and directed next year's law school musical: This is an immensely challenging logistical and artistic task.
.
Sophia has a deep commitment to public service, and I have no doubt that she would use a federal clerkship as a springboard into that kind of career. This comes from growing up in a household with a Muslim migrant father (who arrived in the United States, basically building a successful business from scratch) and a Jewish lawyer mother (who has longed worked on immigration issues). She has consistently worked in the family business since high school. During college, Sophia interned for both Democratic Senator Tim Kaine of Virginia and Republican Congressman Will Hurd of Texas, working on difficult and

contentious issues such as immigration—and often ghostwriting for her bosses (for publication in places such as the Wall Street Journal and the Washington Post). She has also worked closely with Running Start, an organization that encourages young women to run for public office. At Barnard, moreover, she founded Hyphenated America, a civic education platform committed to making immigration laws and policies easier to understand.

During law school, Sophia has worked consistently and carefully to advance her public service career. Last summer, she interned at the Justice Department's Office of Legal Policy. There, she collaborated with the U.S. Attorney's Office for the Southern District of New York, as well as professionals at the Department of Homeland Security, on a range of policy and regulatory tasks. She also helped with the vetting process of candidates for federal judgeships and their confirmation with the White House.

Based on all this evidence, I have every expectation that Sophia will be a very good law clerk. I am thus a very keen supporter of her application, and very much hope you consider it seriously. I would be happy to answer any questions you have about her candidacy and can be reached at your disposal at huq@uchicago.edu or 703 702 9566.

Sincerely,

Aziz Huq

Frank and Bernice J. Greenberg Professor of Law

Professor Saul Levmore
William B. Graham Distinguished Service Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
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June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Sophia Houdaigui has told me of her interest in clerking for you. She is an extremely likeable and hardworking applicant who just might be the most popular person in our law school – with great insight into people and, from a professor's point of view, excellent insight into political views and the impact of law on people's lives. She will quickly become the best friend of her co-clerks, and she will bring out the best in them and the best in any team. She's a natural leader, and yet is eager to please professors and, I presume, supervisors and judges.

Sophia is a curious blend of politics and pragmatism. On the one hand, she has not met a liberal organization or cause that she does not want to champion with energy and optimism and, on the other hand, perhaps because her father owns a bagel store, she is quite sensitive to the impact of liberal politics, law, and especially criminal law on actual people who are trying to make a business flourish.

She has grown a great deal in her first two years at the University of Chicago. As you will see from her grades, she started out by memorizing the facts of cases and doing poorly on exams. And then, by her second year, she figured out what law is about and what she is here to learn. Her grades rose by leaps even as she managed organizations and brought in speakers – while getting her classmates of varying political inclinations to talk, to sponsor these speakers together, and to learn from one another.

She is also about as personable and quick as one can get. Her prior experience in acting and comedy is apparent (though she sometimes hides this skill appropriately). If you say something ironic or subtle, she will be the first in your chambers to discern the humor. I suspect she is a real catch and certainly someone to meet.

Sincerely,
Saul Levmore

Sophia Houdaigui
5454 S. Shore Drive, Chicago, Illinois 60615 | (202) 352-6832 | shoudaigui@uchicago.edu

Writing Sample

I prepared the attached writing sample for my Current Issues in Criminal and National Security Law course at the University of Chicago Law School. In this assignment, I was asked to prepare a majority and dissenting opinion on a fictional *Quarles* claim in the Supreme Court. To create a 10-page writing sample, I omitted the information regarding *Quarles* and *Miranda* and the facts section which details the following distinct questions. The first concerns the applicability of the public safety exception articulated in *New York v. Quarles* to terrorism-related attacks. *New York v. Quarles*, 467 U.S. 649 (1984). The second regards the scope of the "joint venture" doctrine. At 12:12 pm EST on April 1, 2021, a pipe bomb detonated in Washington, DC. As a result of the explosion, five individuals were killed and approximately fifteen were injured. The fictional petitioner, Nawaf al-Hazimi, was arrested in connection with the attack in the Republic of South Susan. On an American plane, a team of FBI officials interviewed al-Hazimi for fourteen hours without reading him the *Miranda* warnings. al-Hazimi argues that the District Court and Court of Appeals erred in denying his motion to suppress his statements to the FBI team aboard the American aircraft. He principally challenges on the public safety exception and the "joint venture" doctrine.

JUSTICE GORSUCH delivered the opinion of the Court.

I.

We start by considering the first *Miranda* issue at hand. As previously described, a team of FBI investigators questioned al-Hazimi on the plane without providing him the *Miranda* warnings. We hold that in this instance, the "public safety" exception to the *Miranda* warning requirement applies and permits the admission of al-Hazimi's statements.

Courts across the country maintain different standards for what may rise to the level of the "public safety" exception articulated in *Quarles*. *See*, *e.g.*, *United States v. Estrada*, 430 F.3d 606, 612 (2d Cir. 2005). In *United States v. Talley*, the Sixth Circuit deemed questioning without *Miranda* warnings permissible when "officers have a reasonable belief based on articulable facts that they are in danger." *United States v. Talley*, 275 F.3d 560, 563 (6th Cir. 2001). This "reasonable belief" involves a variety of factors including "the known history and characteristics of the suspects, the known facts and circumstances of the alleged crime, and the facts and circumstances confronted by the officer." *United States v. Williams*, 483 F.3d 425, 428 (6th Cir. 2007). The court in *Williams* further clarified the public safety exception in mandatory terms, requiring that an officer "have reason to believe (1) that the defendant might have (or recently have had) a weapon, and (2) that someone other than police might gain access to that weapon and inflict harm with it." *Id*.

al-Hazimi's contention that his statements to the team of FBI investigators aboard the American aircraft should have been suppressed based on a violation of his *Miranda* rights fails because the remarks fall within the public safety exception. Under the logic articulated in *Quarles*, the team of investigators maintained reasonable belief that the public was in danger. Such "reasonable belief" stemmed directly from the known facts and circumstances of the deadly nature of the April 1 attack. Fulfilling the mandatory nature of the public safety exception as expressed in *Talley*, the investigators had strong reason to believe that (1) al-Hazimi was recently in possession of an explosive device and

(2) that another person could access an associated weapon with the petitioner and inflict further harm with it.

In similar cases to the facts at hand, wherein individuals suspected of terrorism have been questioned without *Miranda* warnings, courts across the country have deemed this process legal under the public safety exception. In *United States v. Khalil*, one of the defendants, Abu Mezer challenged the district court ruling that the "public safety" exception permitted interrogation without *Miranda* warnings. *United States v. Khalil*, 214 F.3d 111, 121 (2d Cir. 2000). Mezer specifically took issue with the admission of a particular statement to government officials. In response to being asked whether or not he intended to kill himself after detonating the pipe bombs in question, he replied "poof." *Id*. The Second Circuit affirmed the lower court's decision, declaring the question and Mezer's response to be related to matters of public safety. Specifically, the court argued that it was related to public safety "given that Abu Mezer's vision as to whether or not he would survive his attempt to detonate the bomb had the potential for shedding light on the bomb's stability." *Id.* As such, the associated officers were not required to administer the *Miranda* warnings.

Parallel to the defendant in *Khalil*, al-Hazimi asserts that his statements to the team aboard the aircraft should have been suppressed. He specifically argues that some of the questions were not related to issues of public safety. We cannot agree. According to the evidence presented, we have no reason to believe that the team of investigators posed any questions unrelated to the matter of public safety. Similar to the question at issue in *Khalil*, we do know that the investigators' inquiries were aimed at "shedding light" on the April 1 attack and associated explosive devices. *Id*.

The Sixth Circuit additionally addressed the "public safety" exception with respect to bombs. In *United States v. Hodge*, while executing a search warrant for evidence of a methamphetamine lab, detective Bryan Gandy and police officer Marc Pierce asked Lonnie Hodge whether there was "anything in the house that could get anyone there hurt." *United States v. Hodge*, 714 F.3d 380, 387

(6th Cir. 2013). After Hodge replied that there was a pipe bomb in the home, Gandy and Pierce commenced a line of questioning aimed at gaining "information about the bomb's construction and stability." *Id*. In reaching its conclusion, the court considered the distinct threats guns and bombs each pose, particularly given the uniquely unstable nature of explosives. *Id*. at 386. The majority in *Hodge* determined that "in a case involving a *gun*, the police must be aware of a third party who can access the gun and harm others…but in a case involving a *bomb*, the presence of third parties who can access the bomb is usually not a compelling consideration." *Id*. *Hodge* establishes the public safety exception to be "limited to situations where the "weapon" in question is one that a person must physically handle in order for it to present a threat to officers." *Id*.

al-Hazimi argues that under the logic of *Hodge*, his statements made aboard the aircraft were not properly admitted. Specifically, he contends that as explosive devices were involved in the April 1 attack, the potential or literal presence of third parties who could access associated pipe bombs was not a compelling consideration. However, we believe that al-Hazimi has grossly misconstrued the Sixth Circuit's interpretation of the threat third parties pose in accessing explosive devices such as bombs. While *Hodge* did differentiate between the threat guns and bombs raise, the court deemed the officers' questions regarding the bomb's construction and stability acceptable. As such, we believe that the statements aboard the aircraft were properly admitted under the logic of *Hodge*.

The Eleventh Circuit addressed a similar issue concerning pipe bombs in *United States v. Spoerke*. *United States v. Spoerke*, 568 F.3d 1236 (11th Cir. 2009). The case considered whether or not the public safety exception permitted police officers to question the defendant without providing sufficient *Miranda* warnings after discovering that he was in possession of unregistered pipe bombs. The court determined that the pipe bombs posed a significant threat to the officers in question and the greater public that outweighed the interests originally articulated in *Miranda*. *Id*. at 1249.

al-Hazimi additionally argues that his statements to FBI investigators aboard the aircraft should not have been admitted under the public safety exception by differentiating the facts at hand from *Spoerke*. The petitioner specifically points to the court's statement that the "questions were designed to discern the threat the bombs presented to the officer and the nearby public." *Id*. He argues that the team of investigators' questions were not designed to discern the threat of the pipe bombs associated with the April 1 attack. Specifically, he supports this assertion by pointing to the length of time that had passed since the incident – over 20 days. But the investigators' questions were posed to determine if al-Hazimi had other explosives that could pose a threat to the public. The team's inquiries were motivated by safety concerns, and as such, fall within the *Quarles* exception.

The application of the public safety exception to terrorism-related cases was recently explored in *United States v. Abdulmutallab*. *United States v. Abdulmutallab*, 739 F.3d 891 (6th Cir. 2014). This case concerned Umar Farouk Abdulmuttalab, often referred to as the "underwear bomber" or "Christmas Day Bomber," a member of a violent jihadist organization affiliated with al-Qaeda. *Id*. at 895. Abdulmutallab boarded a flight on December 25, 2009 with the intention of detonating "an explosive device in his underwear." *Id*. The device instead malfunctioned and as a result of the attempted attack, the pilot subsequently executed an emergency landing. After being transferred to a hospital for treatment, FBI Special Agent Timothy Waters questioned Abdulmutallab for approximately fifty minutes without *Miranda* warnings. *United States v. Abdulmutallab*, No. 10-20005, 2011 WL 4345243, at *1 (E.D. Mich. Sept. 16, 2011).

Affirmed by the Sixth Circuit, the district court determined that the public safety exception applies to the circumstances at hand. *Id*. at *5. The questions posed by Agent Waters "were intended to shed light on the obvious public safety concerns in this case." *Id*. Specifically, such questions "sought to identify any other attackers or other potentially imminent attacks—information that could be used in

conjunction with other U.S. government information to identify and disrupt such imminent attacks before they could occur." *Id*.

al-Hazimi argues that his statements to the team of FBI investigators should be suppressed in distinguishing the facts from that of *Abdulmutallab*. The petitioner emphasizes the discrepancy in questioning periods, with Abdulmutallab's occurring for 50 minutes and his own lasting 14 hours. al-Hazimi points to the district court's potentially restrictive language; "the agents limited their questioning to approximately 50 minutes, at which time they had sufficient information to address the threat to public safety." *Abdulmutallab*, No. 10-20005, 2011 WL 4345243, at *6. However, the team of FBI investigators at issue also limited their questioning but necessitated more time to obtain sufficient information to address the threat at hand.

There are key factual similarities that further minimize the persuasiveness of al-Hazimi's argument. Specifically, the court notes that Agent Waters knew of the defendant's claim to be associated with and acting on behalf of al-Qaeda – which is almost identical to our understanding of the FBI investigators' knowledge of al-Hazimi. The district court in *Abdulmutallab* determined that mindful of such association "and knowing the group's history of large, coordinated plots and attacks, the agents logically feared that there could be additional, imminent aircraft attacks in the United States and elsewhere in the world." *Id*. The team aboard the aircraft maintained similar knowledge and fear of al-Qaeda's coordinated history and accordingly posed questions aimed at obtaining information regarding potential imminent attacks.

II.

al-Hazimi additionally argues that his statements made to South Sudanese representatives, in addition to any reference to such utterances, should not be admitted into evidence. He contends that the interview constitutes a "joint venture" between South Sudanese officials and United States law enforcement. The law has determined that "statements taken by foreign police in the absence of